Supreme Court, U.S.
FILED
00-484 SEP 25 2000
No. OFFICE OF

IN THE

SUPREME COURT OF THE UNITED STATES

FREDERICK HARRIS, ET AL.,

Petitioners

v.

WAYNE GARNER, ET AL.,

Respondents

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

STEPHEN B. BRIGHT
COUNSEL OF RECORD
TAMARA H. SERWER
SOUTHERN CENTER FOR HUMAN RIGHTS
83 Poplar Street, N.W.
Atlanta, GA 30303
(404) 688-1202

QUESTIONS PRESENTED FOR REVIEW

1. Does the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), require inmate-litigants to exhaust administrative remedies even when no remedies remain available and no policy objectives can be served?

2. Does the exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), violate the Due Process Clause of the Fourteenth Amendment, where the prison's administrative grievance system provides prisoners only five days to file a grievance?

3. Are claims of excessive force "actions with respect to prison conditions" for purposes of the exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a)?

4. Does the physical injury requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e), bar retrospective remedies for all non-physical constitutional claims, and if so, is the statute constitutional?

PARTIES TO THE PROCEEDING

PETITIONERS

Frederick Harris, Danny Chadwick, Lenois Cook, Willie Hooks, Alan Kilgore, Leroy Langes, Farrell Nation, James Wade, Dayton Brinkley, William Dailey, and Samuel Locklear.

RESPONDENTS

Wayne Garner, Commissioner of the Georgia Department of Corrections, A.G. Thomas, Director of Facilities Division of the Georgia Department of Corrections; Duke Blackburn, Executive Assistant, Special Operations of the Georgia Department of Corrections; and Twenty-two Unnamed Tactical Squad Officers of the Georgia Department of Corrections.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT UNDER RULE 29.4(b) 2

STATEMENT OF THE CASE 3

ARGUMENT AND AUTHORITIES 7

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE DECISIONS OF THE COURTS OF APPEALS CONCERNING WHETHER PRISONERS MUST EXHAUST ADMINISTRATIVE REMEDIES PURSUANT TO THE PRISON LITIGATION REFORM ACT, 42 U.S.C. § 1997e(a), EVEN WHEN NO REMEDIES REMAIN AVAILABLE AND NO POLICY OBJECTIVES CAN BE SERVED. 7

II. THIS COURT SHOULD GRANT CERTIORARI TO SETTLE WHETHER THE EXHAUSTION REQUIREMENT OF THE PRISON LITIGATION REFORM ACT, 42 U.S.C. § 1997e(a), VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, WHERE THE PRISON'S ADMINISTRATIVE GRIEVANCE SYSTEM PROVIDES PRISONERS WITH ONLY FIVE DAYS TO FILE A GRIEVANCE. 14

III. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE WHETHER CLAIMS OF EXCESSIVE FORCE ARE "ACTIONS WITH RESPECT TO PRISON CONDITIONS" FOR PURPOSES OF 42 U.S.C. § 1997e(a). 17

IV. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE DECISIONS OF THE COURTS OF APPEALS AND SETTLE AN IMPORTANT FEDERAL QUESTION CONCERNING THE PROPER SCOPE AND APPLICATION OF THE PHYSICAL INJURY REQUIREMENT OF THE PRISON LITIGATION REFORM ACT, 42 U.S.C. § 1997e(e). 19

CONCLUSION 29

APPENDIX 1: *Harris v. Garner*, 216 F.3d 970 (11th Cir. June 27, 2000) (en banc) ..... App. 1

APPENDIX 2: *Harris v. Garner*, 190 F.3d 1279 (11th Cir. Sept. 30, 1999) ..... App. 78

APPENDIX 3: *Harris v. Garner*, Civil Action No. 98-8899 (entered June 24, 1998) ..... App. 97

APPENDIX 4: *Recommendation of Magistrate, Harris v. Garner*, Civil Action No. 98-8899 (entered March 11, 1998) ..... App. 101

TABLE OF AUTHORITIES

Federal Cases

Alexander v. Hawk, 159 F.3d 1321 (11th Cir. 1998) 8, 9, 12, 13

Babcock v. White, 102 F.3d 267 (7th Cir. 1996) 22

Booth v. Churner, 206 F.3d 289 (3d Cir. 2000) 18

Burton v. Livingston, 791 F.2d 97 (8th Cir. 1986) 21

Bush v. Lucas, 462 U.S. 367 (1983) 25, 26

Canell v. Lightner, 143 F.3d 1210 (9th Cir. 1998) 21, 22

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 24

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 14, 15

Crayton v. Callahan, 120 F.3d 1217 (11th Cir. 1997) 13

Davis v. District of Columbia, 158 F.3d 1342 (D.C. Cir. 1998) 24

Davis v. Streekstra, ___F.3d___, 2000 WL 1268169 (7th Cir. Sept. 7, 2000) 9

Felder v. Casey, 487 U.S. 131 (1988) 15

Fortner v. Thomas, 983 F.2d 1024 (11th Cir. 1993) 20, 21

Freeman v. Francis, 196 F.3d 641 (6th Cir. 1999) 18

Friedland v. Fauver, 6 F. Supp. 2d 292, 310 (D.N.J. 1998) 23

Garrett v. Hawk, 127 F.3d 1263 (10th Cir. 1997) 9

Gomez v. Chandler, 163 F.3d 921 (5th Cir. 1999) 21

Harris v. Ford, 32 F. Supp. 2d 1109, 1110 (D. Alaska 1999) 11

Harris v. Garner, 190 F.3d 1279 (11th Cir. 1999) ..... *passim*

Harris v. Garner, 216 F.3d 970 (11th Cir. 2000) 1, 6

Hudson v. McMillian, 503 U.S. 1 (1992) 20

Hudson v. Palmer, 468 U.S. 517 (1984) 20

Johnson v. Robison, 415 U.S. 361 (1974) 28

Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993) 20

Lacey v. C.S.P. Solano Medical Staff, 990 F. Supp. 1199 (C.D. Cal. 1997) 11

Lewis v. Casey, 518 U.S. 343 (1996) 15

Liner v. Goord, 196 F.3d 132 (2d Cir. 1999) 22

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 14

Lunsford v. Jumao-As, 155 F.3d 1178 (9th Cir. 1998) 9

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 25

McCarthy v. Madigan, 503 U.S. 140 (1992) 15

Miller v. Menghini, 213 F.3d 1244 (10th Cir. 2000) 8

Mitchell v. Farcass, 112 F.3d 1483 (11th Cir. 1997) 27

Murray v. The Schooner Charming Betsy,
6 U.S. (2 Cranch) 64 (1804) 28

Nyhius v. Reno, 204 F.3d 65 (3d Cir. 2000) 8, 10

Odumosu v. Keller, 53 F. Supp. 2d 545 (N.D.N.Y. 1999),
rev'd, 205 F.3d 1324 (2nd Cir. 2000) 9

Owens v. Okure, 488 U.S. 235 (1989) 15

Parrish v. Johnson, 800 F.2d 600 (6th Cir. 1986) 21

Perez v. Wisconsin Department of Corrections,
182 F.3d 532 (7th Cir. 1999) 10, 13

Raines v. Pickman, 103 F. Supp. 2d 552, 554
(N.D.N.Y. 2000) 18

Robinson v. Page, 170 F.3d 747 (7th Cir. 1999) 22

Roller v. Gunn, 107 F.3d 227 (4th Cir. 1997) 15

Rowe v. Shake, 196 F.3d 778 (7th Cir. 1999) 22

Rumbles v. Hill, 182 F.3d 1064 (9th Cir. 1999) 9, 10

Schweiker v. Chilicky, 487 U.S. 412 (1988) 26

Thomas v. Farley, 31 F.3d 557 (7th Cir. 1994) 21

Trans World Airlines, Inc. v. Franklin Mint Corp.,
466 U.S. 243 (1984) 28

Underwood v. Wilson, 151 F.3d 292 (5th Cir.), *cert. denied*, 119 S. Ct. 1809 (1999) 9, 10, 11

Warburton v. Underwood, 2 F. Supp. 2d 306, 315 (S.D.N.Y. 1998) 23

Webster v. Doe, 486 U.S. 592 (1988) 23, 28

Weinberger v. Rossi, 456 U.S. 25 (1982) 28

Weinberger v. Salfi, 422 U.S. 749 (1975) 9, 10, 28

Wendell v. Asher, 162 F.3d 887 (5th Cir. 1998) 9, 10, 11

White v. Fauver, 19 F. Supp. 2d 305, 317 (D.N.J. 1998) 9, 18

Whitley v. Hunt, 158 F.3d 882 (5th Cir. 1998) 9

Wright v. Morris, 111 F.3d 414 (6th Cir. 1997) 10

Wyatt v. Leonard, 193 F.3d 876 (6th Cir. 1999) 8

Zehner v. Trigg, 133 F.3d 459 (7th Cir. 1997) 22, 24, 25

Federal Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 ..... 6, 10

28 U.S.C. § 1343(a)(3) 6

28 U.S.C. § 1441 26

28 U.S.C. § 2403(a) 2

42 U.S.C. § 1983 26

42 U.S.C. § 1997e(a) ..... *passim*

42 U.S.C. § 1997e(c)(2) 11

42 U.S.C. § 1997e(e) ..... *passim*

Legislative History

136 Cong. Rec. S17486-01 (Oct. 27, 1990) 28

138 Cong. Rec. S4781-01 (Apr. 2, 1992) 28

141 Cong. Rec. H1472-06, H1480 27

141 Cong. Rec. S14413, S14414 27

Treaties

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85 28

International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 28

Miscellaneous

Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1363-66 (1953) 26, 27

Lawrence G. Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 82 (1981) 23, 27

Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1737 (1991) 25

Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689, 730-31 (1990) 28

STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS, § 10.3 at 10.9 25

OPINIONS BELOW

The en banc opinion of the Eleventh Circuit Court of Appeals, reported at *Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000), is attached as Appendix 1. The panel opinion, reported at *Harris v. Garner*, 190 F.3d 1279 (11th Cir. 1999), is attached as Appendix 2. The unpublished opinion of the district court, *Harris v. Garner*, Civil Action No. 98-8899 (*entered* June 24, 1998), is attached as Appendix 3. The recommendation of the magistrate, *Harris v. Garner*, Civil Action No. 98-8899 (*entered* March 11, 1998), is attached as Appendix 4.

JURISDICTION

The Court of Appeals entered its en banc opinion on June 27, 2000. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution, in pertinent part, provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

The Eighth Amendment to the United States Constitution, provides:

> Excessive bail shall not be required, nor excessive fines imposes, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution, in pertinent part, provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), provides:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), provides:

> No federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility for mental or emotional injury suffered while in custody without a prior showing of physical injury.

STATEMENT UNDER RULE 29.4(b)

Since the proceeding draws into question the constitutionality of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) and § 1997e(e), and neither the United States nor any agency, officer, or employee thereof is a party, 28 U.S.C. § 2403(a) may be applicable. In the case below, the Eleventh Circuit Court of Appeals, pursuant to § 2403(a), certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn into question.

STATEMENT OF THE CASE

On March 10, 1997, plaintiffs filed their *Complaint,* alleging that on October 23, 1996, defendants Garner, Thomas, and Blackburn directed and supervised a Tactical Squad shakedown at Dooly State Prison ("Dooly"), a medium/minimum security prison in Unadilla, Georgia. According to the *Complaint*, Tactical Squad officers entered the prison dressed in riot gear, marching in formation and chanting "kill, kill, kill."

One squad of 20 to 30 officers entered a dormitory and began cursing and ordering inmates to run out of their cells and strip naked. Plaintiff Hooks, unable to move quickly because of serious medical problems with his leg and back, was yanked by his shirt collar and pulled outside. Once outside, inmates -- including plaintiffs Harris, Chadwick, Cook, Hooks, Kilgore, Langes, Nation, and Wade -- were subjected to body cavity searches in the presence of numerous female staff members. Tactical Squad officers ordered the inmates to open their mouths; to run their fingers through their hair; to raise their arms; to lift their feet; to lift their genitals; to squat and cough; and to turn around, bend over, and spread their buttocks so that their anuses were exposed. As these body cavity searches were being conducted, officers harassed, threatened, and yelled obscenities at the inmates; female staff members whispered to each other, laughed, and pointed. Plaintiff Wade was forced to "dry shave" with a razor. Inmates' personal items and religious materials were dumped on the floor or in toilets, thrown out the door, or destroyed. Defendants Garner, Thomas, and Blackburn observed all this conduct, but did nothing to stop it.

Similar abuse occurred in other dormitories. In one, two officers ordered plaintiff Dailey to strip, called him "one of them fuck boys," and shoved him backwards to the ground. After conducting a body cavity search on Dailey while

harassing and threatening him, the officers told him if he said anything about this incident, they would lock him up and "beat" his "ass" until he did not "want to be gay anymore." They ordered him to run downstairs, half-naked and with his pants falling down, past a group of women in the control center.

An officer ordered plaintiff Locklear to hold his right foot in his left hand, then switch quickly, then switch again. Locklear had to perform this "dance" for about a minute; the two officers watched and laughed. Two officers rushed into plaintiff Brinkley's cell, harassed, threatened, and slapped Brinkley in the face. Brinkley told an officer that he had medical problems with his back and ankle. An officer ordered Brinkley, among other things, to bend over, spread his buttocks, and "show it" to his cellmate. As Brinkley obeyed, the officers laughed at him. Putting his clothes back on, Brinkley bent over to tie his shoelaces. Without any provocation, an officer hit Brinkley's back with his fist and Brinkley collapsed to the floor. As Brinkley stood up, the officer slapped him in the face again and ordered him out of the cell.

Defendants Garner, Thomas, and Blackburn allowed and encouraged Tactical Squad officers to abuse inmates without provocation. They failed to intervene even when it was clear that officers were engaging in such abuse. As a result of defendants' conduct, plaintiffs suffered physical injuries, loss of personal property, severe pain, anxiety, humiliation, shock, and indignity. Many inmates at Dooly filed grievances about the abuse they suffered; all these grievances were summarily denied.

Plaintiffs sought a declaration that defendants' acts violated the Constitution, compensatory and punitive damages, injunctive relief, and other relief. On April 8, 1997, the Magistrate Judge found that plaintiffs had a "reasonable opportunity to prevail on the merits" of their *Complaint* and

ordered defendants to respond. (App. D at 8). On May 12, defendants Garner, A.G. Thomas, and Duke Blackburn filed a *Pre-Answer Motion to Dismiss*. Defendants argued that plaintiffs' suit should be dismissed for failure to exhaust administrative remedies, failure to allege "physical injury," and lack of standing to obtain declaratory and injunctive relief.

On February 4, 1998, plaintiffs submitted a response to the *Motion to Dismiss*, along with a motion to withdraw the injunctive claims of plaintiffs Danny Chadwick, Lenois Cook, William Dailey, Frederick Harris, Willie Hooks, and Farrell Nation due to their release from prison.[1]

On March 11, 1998, the Magistrate Judge recommended that the claims of plaintiffs Samuel Locklear, Alan Kilgore, Leroy Langes, Dayton Brinkley, and James Wade be dismissed without prejudice under 42 U.S.C. § 1997e(a), the administrative exhaustion requirement of the Prison Litigation Reform Act (PLRA). *See* (App. D at 27-5-6). All five could seek injunctive relief after exhaustion, but only Brinkley could also seek monetary relief under 42 U.S.C. § 1997e(e), the "physical injury" requirement of the PLRA. *Id.* The Magistrate Judge further recommended that plaintiffs Chadwick, Cook, Dailey, Harris, Hooks, and Nation be dismissed with prejudice pursuant to § 1997e(e). *Id.* at 5. The Magistrate Judge acknowledged that all of these plaintiffs had been released from prison (R1-27-1 n.1), but held that "§ 1997e(e) is applicable to the claims of prisoners who have been released." (R1-27-5 n. 9).

On June 24, the District Court issued an *Order* adopting the Magistrate Judge's *Recommendation*, with one alteration:

---

1. Langes and Wade were subsequently also released from prison. Brinkley, Kilgore, and Locklear remain incarcerated.

it ruled that plaintiff Wade had exhausted administrative remedies, but was still subject to dismissal under § 1997e(e). (App. C-34-2). The court entered judgment for defendants against all plaintiffs.[2]

Plaintiffs appealed the district court's judgment, and the Eleventh Circuit entered an opinion on September 30, 1999. *Harris v. Garner*, 190 F.3d 1279 (11th Cir. 1999)(App. B). The panel affirmed the district court's dismissal without prejudice of plaintiffs Locklear, Kilgore, Langes, and Brinkley under this statute, *id.* at 1290, although it did not address the GDC's refusal to allow them to pursue administrative remedies not requested within five days of the complained-of events. The panel also held that § 1997e(e) did not apply to prisoners who have been released, and that plaintiffs Chadwick, Cook, Dailey, Harris, Hooks, and Nation had effectively become former prisoners for the statute's purposes when they withdrew their injunctive claims and the District Court treated their *Complaint* as amended on this basis. 190 F.3d at 1284. The panel did apply § 1997e(e) in affirming the dismissal of plaintiff Wade's claims.

Both plaintiffs and defendants petitioned for rehearing. The Court of Appeals granted a rehearing en banc and vacated the panel's opinion. The Court of Appeals entered its en banc opinion on June 27, 2000, reinstating the panel opinion in all respects except insofar as it relates to the claims of the six plaintiffs who were released before the district court entered judgment against them. *See Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000) (App. 1). The Court ruled that the claims of these plaintiffs were barred by § 1997e(e), and dismissed these claims without prejudice.

---

2. The district court had jurisdiction over petitioners' *Complaint* pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3).

ARGUMENT AND AUTHORITIES

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE DECISIONS OF THE COURTS OF APPEALS CONCERNING WHETHER PRISONERS MUST EXHAUST ADMINISTRATIVE REMEDIES PURSUANT TO THE PRISON LITIGATION REFORM ACT, 42 U.S.C. § 1997e(a), EVEN WHEN NO REMEDIES REMAIN AVAILABLE AND NO POLICY OBJECTIVES CAN BE SERVED.

As interpreted and applied by the Eleventh Circuit Court of Appeals in the panel opinion below, the administrative exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a),[3] prevents prison inmates from filing meritorious federal constitutional claims if the inmate has not first exhausted all administrative remedies -- regardless of whether the remedy sought by the inmate is available through the administrative grievance procedure. *See Harris v. Garner*, 190 F.3d 1279, 1286 (11th Cir. 1999). Although it construed the exhaustion requirement as an absolute bar to federal civil actions brought by prisoners with respect to prison conditions, the court declined to address whether the administrative

---

3. This provision states:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

grievance procedure met even the minimum guarantees of due process.

The Court of Appeals found that federal courts of appeal are divided with respect to the proper application of the exhaustion requirement, but found that its disposition of plaintiffs' challenge was controlled by *Alexander v. Hawk*, 159 F.3d 1321 (11th Cir. 1998). The panel declined to limit the holding in *Alexander* to its facts,[4] and reaffirmed that "prisoners must exhaust all administrative remedies that are available before filing suit, regardless of their adequacy" and even if the relief they seek is not "available within the administrative apparatus." *Harris*, 190 F.3d at 1286. The court sitting en banc declined to reconsider the ruling in *Alexander*, which has been followed by the Third and Sixth Circuits. *See Nyhius v. Reno*, 204 F.3d 65, 72 (3d Cir. 2000) (exhaustion of administrative remedies mandatory regardless of futility); *Wyatt v. Leonard*, 193 F.3d 876, 878, 256 (6th Cir. 1999) (same).

The Fifth, Ninth, and Tenth Circuits have recognized that while exhaustion under § 1997e(a) is generally required, it may be excused when it would serve no policy objective and provide no remedy to the complaining inmate. *See Miller v. Menghini*, 213 F.3d 1244, 1246 (10th Cir. 2000) (holding that state prisoner who seeks both money damages and injunctive relief need not exhaust administrative remedies for damages because no available state administrative procedures provide

---

4. *Alexander* involved a single plaintiff, a current federal inmate, who sought both monetary and injunctive relief in his challenge to the enforcement of new federal legislation restricting inmates' access to magazines that are sexually explicit or feature nudity. 159 F.3d at 1322, 1327. The Federal Bureau of Prisons system of administrative remedies provided at least some of the relief that plaintiff sought, and his failure to exhaust prevented the creation of any administrative record or opportunity for the Bureau to address and correct its allegedly unconstitutional enforcement policy. *Id.* at 1327-28.

that remedy); *Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999) (section 1983 claim may not be dismissed for failure to exhaust administrative remedies that do not provide the relief sought by plaintiff); *Wendell v. Asher*, 162 F.3d 887 (5th Cir. 1998) (same); *Whitley v. Hunt*, 158 F.3d 882 (5th Cir. 1998) (same); *Lunsford v. Jumao-As*, 155 F.3d 1178 (9th Cir. 1998) (same); *Underwood v. Wilson*, 151 F.3d 292 (5th Cir.), *cert. denied*, 119 S. Ct. 1809 (1999); *Garrett v. Hawk*, 127 F.3d 1263 (10th Cir. 1997) (same); *see also Davis v. Streekstra*, ___F.3d___, 2000 WL 1268169 (7th Cir. Sept. 7, 2000) (administrative process must be exhausted "when the conditions about which the prisoners complain still exist" because prison could provide type of relief and "alter the conditions of which the prisoner complains"); *Odumosu v. Keller*, 53 F. Supp. 2d 545, 546 (N.D.N.Y. 1999), *rev'd*, 205 F.3d 1324 (2nd Cir. 2000)("administrative action could afford [plaintiff] neither meaningful review nor appropriate remedy and the benefits of exhaustion do not obtain . . . [The Court] will not require [plaintiff] to engage in the futile pursuit of seeking administrative remedies that are not available"); *White v. Fauver*, 19 F. Supp. 2d 305, 317 (D.N.J. 1998) (concluding that it would be senseless to force a prisoner to engage in the "empty formality" of petitioning the prison administrative process for a form of relief that it cannot provide, and refusing to adopt an interpretation that "would compel the conclusion that 'Congress intended to erect meaningless barriers to suit.'"). This Court should grant certiorari to resolve this conflict in the court of appeals.

In *Alexander* the Eleventh Circuit based its holding on an implicit finding that § 1997e(a) is jurisdictional in nature. Specifically, it cited *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975), for the proposition that "where exhaustion is a statutorily specified jurisdictional prerequisite, 'the requirement . . . may not be dispensed with merely by a judicial conclusion of futility.'" *Alexander*, 159 F.3d at 1326.

All other circuits that have considered this question have held, however, that § 1997e(a) does not restrict the jurisdiction of federal courts. As the Fifth Circuit explained, the Supreme Court's analysis in *Salfi* compels this conclusion:

> A statute requiring exhaustion of administrative remedies may be jurisdictional if it is "more than a codified requirement of administrative exhaustion" and contains "sweeping and direct" statutory language that goes beyond a requirement that only exhausted actions be brought. *See Weinberger v. Salfi*, 422 U.S. 749, 757, 95 S. Ct. 2457, 45 L.Ed.2d 522 (1975) . . . .
>
> In contrast, § 1997e(a) contains no such sweeping and direct language barring federal question jurisdiction under 28 U.S.C. § 1331. Rather than proscribing the existence of a federal cause of action, the Civil Rights Act specifically creates a civil cause of action . . . . Section 1997e(a) merely provides that "[n]o action shall be brought until such administrative remedies as are available are exhausted." This is precisely the type of language held in *Weinberger v. Salfi* not to limit federal jurisdiction . . . .

Underwood, 151 F.3d at 294; *accord Nyhuis*, 204 F.3d 65, 69 (3rd Cir. 2000); *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532, 535 (7th Cir. 1999); *Rumbles*, 182 F.3d at 1067-68; *Wright v. Morris*, 111 F.3d 414, 420 (6th Cir. 1997).

There is no disagreement that § 1997e(a) replaced the "entirely discretionary" balancing test that had governed prisoner exhaustion prior to the PLRA's enactment. *Wendell*,

162 F.3d at 890. But because exhaustion under § 1997e(a) is not jurisdictional, it is subject to "certain defenses such as waiver, estoppel, or equitable tolling." *Id.* This conclusion is supported by the statute's use of the term "available." As the Fifth Circuit observed, dictionary definitions of this term include "capable of use for the accomplishment of a purpose" and "that is accessible and may be obtained." *Underwood*, 151 F.3d at 295 (quoting WEBSTER'S NEW INT'L DICTIONARY 150 (3d ed. 1981)); *accord Harris v. Ford*, 32 F. Supp. 2d 1109, 1110 (D. Alaska 1999); *Lacey v. C.S.P. Solano Medical Staff*, 990 F.Supp. 1199, 1205 (C.D. Cal. 1997) ("The [grievance] procedure cannot be used to accomplish the purpose of the plaintiff's civil rights action. Accordingly, it is not an 'available' administrative remedy within the ordinary meaning of that word.")

The record in this case shows that even though their claims were dismissed without prejudice[5] (R1-27-5-6), absolutely no administrative remedies remained available to plaintiffs Locklear, Kilgore, or Brinkley, the three plaintiffs who remained in the GDC's custody at the time of the plaintiffs' appeal.[6] All three filed grievances in March and April of 1998, after the district court dismissed their claims without prejudice, presumably to allow them to exhaust their remedies before refiling. All were denied for failure to comply

---

5. A related section of the PLRA suggests that, for non-frivolous unexhausted claims, district courts will "requir[e] the exhaustion of administrative remedies," not dismiss those claims with prejudice. *See* 42 U.S.C. § 1997e(c)(2).

6. Plaintiff Langes was released from prison in 1998. As a former prisoner, he is unable to engage the internal administrative remedies of the Georgia Department of Corrections. Indeed, in most grievance systems the matter will be time-barred by the time exhaustion is addressed in the district court, making dismissals without prejudice meaningless.

with the GDC's five-day filing deadline.[7] In other words, their requests for administrative remedies were denied, and their constitutional claims forever barred, because they did not succeed in researching their rights, obtaining the proper forms, and then filing grievances within *five days* of the time when Locklear was ordered to "tap dance" naked for the amusement of Tactical Squad officers, or when an officer, responding to Brinkley's description of his medical condition, slapped and struck Brinkley, knocking him to the floor. *See* (R1-1-13-15).

As observed by the panel in *Alexander*, a general exhaustion requirement may serve policy objectives, such as the creation of an administrative record "for review in any subsequent proceedings" and allowing an agency to "correct any mistakes it might find before the federal judiciary became involved." 159 F.3d at 1327-28. However, the record below clearly established that the prison chose not to address or correct its own mistakes even after the inmates brought the constitutional violations to the prison's attention. Inmates at Dooly State Prison filed *nine* sets of grievances and appeals. *See* (R1-9, Attach. A-E; R1-24, Attach.; R1-31, Attach.). All addressed the same abuse challenged in this action.[8] All were summarily denied. The defendants have never suggested that they would act differently in the future. Predictably, when the GDC received the grievances of plaintiffs Locklear, Kilgore, and Brinkley, it denied them as time-barred by the five-day

---

7. Plaintiffs attached these grievances and denials to their *Supplement* to their *Objections* to the Magistrate Judge's *Recommendation*. *See* (R1-33, Attach.).

8. The inmates who filed these grievances described the constitutional violations they suffered and even cited decisional law by this Court. The GDC altogether ignored these constitutional claims in its responses, stating merely that the abusive conduct did not amount to a "rule violation." The GDC did not specify to which "rule" it referred or why the conduct was not grievable.

filing deadline, rather than investigating and addressing the complaints of these prisoners. It is clear that even if the Department of Corrections had considered the grievances of Locklear, Kilgore, and Brinkley, filed more than a year after the five-day deadline, the outcome would be "a forgone conclusion." *Crayton v. Callahan*, 120 F.3d 1217, 1221 (11th Cir. 1997).[9]

In response to each of the nine inmate grievances, the GDC attached the same nine statements by Dooly officers. These documents create a useful pre-discovery record for this litigation. Defendants have never claimed that any further attempts at exhaustion would have expanded the record or contributed to the district court's analysis of plaintiffs' constitutional claims in any manner. Thus, the administrative record in this case is as complete as it will ever be. —

This Court should grant certiorari to decide whether the PLRA should be read to require plaintiffs to engage in the empty formality of filing a grievance when the administrative process could not provide them any relief, and serves as nothing more than a meaningless barrier to suit.

---

9. This point distinguishes this case from *Perez v. Wisconsin Dep't of Corrections*, where the court dismissed the plaintiff's futility argument with the following reasoning: "No one can *know* whether administrative requests will be futile; the only way to find out is to try." 182 F.3d at 536. In this case, we *do* know that further administrative requests would be futile. The undisputed record shows that this is the rare case where "no further administrative action could supply *any* 'remedy.'" *Id.* at 538. Not even "lightning" could strike. *Cf. Alexander*, 159 F.3d at 1325 (quoting *Irwin v. Hawk*, 40 F.3d 347, 349 (11th Cir. 1994), *cert. denied*, 516 U.S. 835 (1995)).

II. THIS COURT SHOULD GRANT CERTIORARI TO SETTLE WHETHER THE EXHAUSTION REQUIREMENT OF THE PRISON LITIGATION REFORM ACT, 42 U.S.C. § 1997e(a), VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, WHERE THE PRISON'S ADMINISTRATIVE GRIEVANCE SYSTEM PROVIDES PRISONERS WITH ONLY FIVE DAYS TO FILE A GRIEVANCE.

Plaintiffs have a property interest in their federal cause of action that is protected by the Due Process Clause of the Fifth Amendment. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). Although the Due Process Clause does not "entitle[] every civil litigant to a hearing on the merits in every case," because the "State may erect reasonable procedural requirements for triggering the right to an adjudication," due process does require an "opportunity . . . granted at a meaningful time and in a meaningful manner, for [a] hearing appropriate to the nature of the case." *Id.* (citations and quotations omitted).

The Georgia Department of Corrections requires inmates to challenge any and all official misconduct, no matter how injurious and abusive, by filing a grievance within five days, or they are barred from receiving an administrative remedy. Elimination of plaintiffs' civil rights claims on the basis that they did not exhaust their administrative remedies violates Due Process, as the Department of Corrections has not provided "constitutionally adequate procedures" in its system of administrative remedies. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). Five days is simply not enough time for a typical state prisoner to research his rights,

obtain the proper forms, and then challenge in writing violent and systematic abuse administered against him by the prison agency's top officials. It is an insufficient "opportunity to present reasons." *Id.* at 546. *Cf. Roller v. Gunn*, 107 F.3d 227, 231, 233 (4th Cir. 1997) (holding that filing fee and cost provisions of the PLRA did not violate right of access to courts because they are only "mild" barriers to the courthouse).

In a different context, this Court recognized that due to the "complexities of federal civil rights litigation," the Court has "disapproved the adoption of state statutes of limitation that provide only a truncated period of time within which to file suit." *Felder v. Casey*, 487 U.S. 131, 140 (1988). Likewise, in a case concerning the selection of the proper statute of limitations period for § 1983 claims, the Court chose a three-year limitations period over a one-year period. Quoting the lower court's reasoning, the Court noted that the longer period "more faithfully represents the federal interest in providing an effective remedy for violations of civil rights." *Owens v. Okure*, 488 U.S. 235, 238 (1989).

The right to a meaningful opportunity to be heard is a right that should be carefully guarded in the prison context, where individuals are politically powerless and are subjected to the absolute control of the state. This Court has stated repeatedly that "[t]he 'first' of 'the principles that necessarily frame our analysis of prisoners' constitutional claims' is that 'federal courts must take cognizance of the valid constitutional claims of inmates.'" *McCarthy v. Madigan*, 503 U.S. 140, 152-53 (1992)(quoting *Turner v. Safley*, 482 U.S. 78, 84 (1987)). Indeed, this Court has long recognized that "[b]ecause a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining most 'fundamental political right, because preservative of all rights.'" *Id.* (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). *See also Lewis v. Casey*, 518 U.S. 343, 351 (1996) (affirming

that prisoners must be provided opportunity to "present claimed violations of fundamental constitutional rights to the courts").

In *McCarthy v. Madigan*, this Court rejected the federal prison system's attempt to prohibit lawsuits from inmates who did not manage to comply with the 15-day, 20-day, and 30-day filing deadlines in its administrative remedy process: such "short, successive filing deadlines," the Court found, "counsel strongly against exhaustion as a prerequisite to the filing of a federal-court action." In this case, however, plaintiffs appear to have lost their "most fundamental" right to file a court action because they failed to meet an even shorter deadline -- and even though the evidence shows that no remedies were provided to those whose grievances were filed on time.

This Court should grant certiorari to address the question of whether the victims of officially sanctioned institutional abuse, such as the plaintiffs in this case, can constitutionally be denied their fundamental right to file a court action because of their failure to meet 5-day and 4-day deadlines -- especially when all evidence shows that no remedy is provided even to those inmates who navigate the near-impossible deadlines successfully. If prisoners must exhaust all administrative remedies, regardless of their adequacy, the process must provide the minimum guarantees of procedural due process. The stakes are too high for due process to be ignored. This case challenges violent and systematic abuse of unresisting inmates fostered by the highest-ranking prison official in Georgia. To stake the constitutional claims of these inmates – largely ill-educated and uncounseled – on their compliance with the GDC's own internal administrative rules, no matter how unreasonable, is to render the Constitution an empty promise.

III. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE WHETHER CLAIMS OF EXCESSIVE FORCE ARE "ACTIONS WITH RESPECT TO PRISON CONDITIONS" FOR PURPOSES OF 42 U.S.C. § 1997e(a).

Section 1997e(a) requires prisoners to exhaust "such administrative remedies as are available" before bringing an action "with respect to prison conditions." The courts are sharply divided as to whether excessive force and assault claims qualifies as actions "with respect to prison conditions." The district court below, adopting the magistrate's recommendation, rejected plaintiffs' argument that they were not required to exhaust administrative remedies, because their claims were not "actions with respect to prison conditions." Although several courts have agreed with plaintiffs' interpretation, and plaintiffs presented this issue below,[10] neither the panel nor the en banc Eleventh Circuit addressed it.

In *Nussle v. Willett*, ___F.3d ___, 2000, WL 1199957 (2d Cir. Aug. 24, 2000), the Second Circuit held that § 1997e(a) does not apply to claims of excessive force or assault. The court reasoned that as a general rule, exhaustion is not a prerequisite to maintaining an action under § 1983, and any exception to this rule should be read narrowly:

> While § 1997e(a) filters through administrative grievance procedures 'prison conditions' claims that may be frivolous as to subject matter, the text, structure, purpose, and legislative history of the PLRA provide

---

10. *See* Brief for Appellant at 20 n.9, *Harris v. Garner*, 190 F.3d 1279 (11th Cir. 1999) (No. 98-8899).

> ample justification for not treating excessive force or assault claims in the same manner. Especially in light of our obligation to construe statutory exceptions narrowly, in order to give full effect to the general rule of non-exhaustion in § 1983 cases, . . . , we distinguish between 'excessive force' and 'prison conditions' claims for purposes of exhaustion . . ."

See also, *Raines v. Pickman*, 103 F. Supp. 2d 552, 554 (N.D.N.Y. June 5, 2000) ("use of excessive force is an intentional assault and battery; it is not a 'prison condition.'"); *White v. Fauver*, 19 F. Supp. 2d 305, 314-15 (D.N.J. 1998) (PLRA's purpose of reducing frivolous suits is not applicable to excessive force claims, which involve allegations of egregious abuse of power by a prison official against an inmate).

Two courts of appeals have explicitly held that excessive force claims are actions brought with respect to prison conditions under § 1997e(a), and therefore must be exhausted. *See Booth v. Churner*, 206 F.3d 289, 293-98 (3d Cir. 2000); *Freeman v. Francis*, 196 F.3d 641, 643-44 (6th Cir. 1999).

This Court should grant certiorari to resolve the question of whether claims of excessive force are "actions brought with respect to prison conditions" under § 1997e(a).

IV. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE DECISIONS OF THE COURTS OF APPEALS AND SETTLE AN IMPORTANT FEDERAL QUESTION CONCERNING THE PROPER SCOPE AND APPLICATION OF THE PHYSICAL INJURY REQUIREMENT OF THE PRISONITIGATION REFORM ACT, 42 U.S.C. § 1997e(e).

This Court should grant certiorari to resolve a split among the circuit courts of appeal on the application of 42 U.S.C. § 1997e(e),[11] the "physical injury" requirement of the PLRA. The Eleventh Circuit applied this provision to affirm the dismissal of plaintiff James Wade's claims for compensatory and punitive damages, and remanded for consideration of his claims for declaratory and injunctive relief.[12] Because Wade was released from prison prior to the Court of Appeals's decision, his injunctive claim is moot, and he is left with no remedy for the constitutional violations committed against him.

Wade alleged that during the shakedown at Dooly, Tactical Squad officers ordered him and other inmates to run

---

11. This provision states:

> No federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility for mental or emotional injury suffered while in custody without a prior showing of physical injury.

12. The Court of Appeals determined that Wade had exhausted the administrative remedies.

outside their cells and strip. While harassing and yelling obscenities, the officers conducted a body cavity search, ordering Wade to open his mouth, run his fingers through his hair, raise his arms, lift his feet, lift his genitals, squat and cough, and then turn around, bend over, and spread his buttocks so that his anus was exposed -- all in front of numerous female prison staff, who during this process whispered to each other, smiled, laughed, and pointed at the naked inmates. Afterwards, as Wade stood naked outside his cell with his nose against the wall, officers ordered him to "dry shave" with a razor, causing pain and injury. Wade claimed that this conduct violated his Fifth, Eighth, and Fourteenth Amendment rights, and sought monetary and injunctive relief.[13]

The Eleventh Circuit panel below rejected Wade's allegation of injury after "fusing" the physical injury analysis under § 1997e(e) with the excessive force standard set forth in *Hudson v. McMillian*, 503 U.S. 1 (1992). *Harris*, 190 F.3d at 1286 (citing *Gomez v. Chandler*, 163 F.3d 921, 924 (5th Cir. 1999)). In *Hudson*, this Court rejected the Fifth Circuit's rule that "minor" injuries were insufficient to sustain a claim of excessive force under the Eighth Amendment. *Id.* at 10. The Court held that when "prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated." *Id.* at 9. "This is true whether or not significant injury is evident." *Id.* A concurring opinion observed that it was "not hard to imagine inflictions of psychological harm -- without corresponding physical harm -- that might prove to be cruel and unusual punishment." *Id.* at 16

---

13. Plaintiffs' *Complaint* alleges in detail malicious and sadistic uses of force, *see Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992), unjustified violations of bodily privacy, *see Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993), and searches involving "calculated harassment unrelated to prison needs," *see Hudson v. Palmer*, 468 U.S. 517, 530 (1984). All eleven plaintiffs were subjected to these constitutional violations.

(Blackmun, J., concurring). *See also Jordan v. Gardner*, 986 F.2d 1521, 1525, 1528 (9th Cir. 1993) (O'Scannlain, J.) (observing in case involving cross-gender body searches that "severe psychological injury and emotional pain and suffering" counts as "infliction of pain" under Eighth Amendment). As Judge Posner has observed, "[m]ental torture is not an oxymoron, and has been held or assumed in a number of prisoner cases . . . to be actionable as cruel and unusual punishment." *Thomas v. Farley*, 31 F.3d 557, 559 (7th Cir. 1994). *See, e.g., Parrish v. Johnson*, 800 F.2d 600, 605 (6th Cir. 1986) (affirming damages for terrorization of paraplegic prisoner by officer brandishing knife, taunting, and extorting him); *Burton v. Livingston*, 791 F.2d 97, 99 (8th Cir. 1986) (recognizing constitutional claim where prison guard cocked revolver and stated "nigger run so I can blow your Goddamn brains out").

Nevertheless, the Eleventh Circuit and Fifth Circuit decided to "fuse" the *Hudson* Court's rule for excessive force claims with all other constitutional claims brought by prisoners, including claims involving racial discrimination, bodily privacy, sexual harassment, denial of religious freedom, and psychological torture. *See Harris*, 190 F.3d at 1286; *Gomez*, 163 F.3d at 924. Because these claims do not generally involve physical injury, these decisions eliminate all retrospective remedies for them.

By construing § 1997e(e) as "fusing" a physical injury requirement to this decidedly non-physical constitutional claim, the court effectively gutted its constitutional ruling in *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993), in which it joined other circuits in recognizing a prisoner's constitutional right to bodily privacy. (In particular, the court recognized a right not to have one's genitals exposed in the presence of people of the other sex without any justification). In contrast to the decision below, several circuit and district courts have adopted an interpretation of § 1997e(e) that limits its

application to non-constitutional claims. In *Canell v. Lightner*, 143 F.3d 1210 (9th Cir. 1998), a Muslim inmate challenged the constitutionality of certain practices under the Establishment and Free Exercise Clauses of the First Amendment. Jail officials argued that § 1997e(e) barred the inmate's claim because he alleged only "mental or emotional injury" without the requisite physical injury. *Id.* at 1213. The court of appeals disagreed:

> Canell is not asserting a claim for "mental or emotional injury." He is asserting a claim for a violation of his First Amendment rights. The deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred. Therefore, § 1997e(e) does not apply to First Amendment Claims regardless of the relief sought.

Id. *See also Robinson v. Page*, 170 F.3d 747, 748 (7th Cir. 1999) (Posner, C.J.) ("It would be a serious mistake to interpret section 1997e(e) to require a showing of physical injury in all prisoner civil rights suits.");[14] *Rowe v. Shake*, 196 F.3d 778, 781 (7th Cir. 1999); *Liner v. Goord*, 196 F.3d 132, 135-36 (2d Cir. 1999) (reversing district court's dismissal under § 1997e(e) of claim challenging "intrusive body searches" because district

---

14. In *Zehner v. Trigg*, 133 F.3d 459, 462-63 (7th Cir. 1997), the Seventh Circuit upheld § 1997e(e) as constitutional "as applied in this case." It is questionable, however, whether the plaintiff in *Zehner*, in alleging exposure to asbestos without any development of illness, had stated a constitutional claim at all. *Cf. Babcock v. White*, 102 F.3d 267, 270 (7th Cir. 1996) (holding that prisoner does not have constitutional damages claim for fear resulting from officials' failure to prevent risk of harm that does not materialize).

court had failed to consider whether prisoner's allegations "might state a claim under the Eighth Amendment in addition to stating a claim for emotional distress."); *Friedland v. Fauver*, 6 F. Supp. 2d 292, 310 (D.N.J. 1998)("[plaintiff] does not seek damages for mental or emotional injury. He seeks damages for unconstitutional incarceration resulting from his arrest without probable cause and his continued incarceration after the preliminary hearing."); *Warburton v. Underwood*, 2 F. Supp. 2d 306, 315 (S.D.N.Y. 1998) (declining to dismiss prisoner's Establishment Clause claim under § 1997e(e)).

This Court has recognized that "'serious constitutional questions' . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). "[D]ue process requires access by a constitutional claimant to some court capable of dealing fairly with his or her claim." Lawrence G. Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 82 (1981).

The Eleventh Circuit panel recognized that "if 1997e(e) actually precluded all effective judicial review, the statute would raise constitutional questions that would be, at the very least, troublesome." 190 F.3d at 1287. To avoid such troublesome constitutional questions, the Eleventh Circuit joined the Seventh and D.C. Circuits in holding that the physical injury requirement of the PLRA survives due process and separation of powers challenges because it restricts only the availability of monetary damages, and does not "materially thwart actions for declaratory and injunctive relief." *Harris*, 190 F.3d at 1288.

Indeed, the courts that have upheld 1997e(e) as properly limiting damages remedies have done so precisely because

those circuits found that other remedies were available. *See Harris*, 190 F.3d at 1290 (holding that § 1997e(e) does not violate due process or equal protection because "[p]risoners still retain a 'reasonably adequate opportunity' to seek relief from constitutional violations that do not involve physical injury, because they may still file suits for declaratory and injunctive relief."); *Zehner*, 133 F.3d at 462-63 (upholding § 1997e(e) as constitutional "as applied in this case" where both injunctive relief and monetary relief for future injury remained available to redress alleged violation); *Davis v. District of Columbia*, 158 F.3d 1342, 1347 (D.C. Cir. 1998) ("Of course a constitutionally permissible curtailment of remedies might still constitute enough of an impingement on the assumed fundamental right to trigger strict scrutiny. But here the remaining remedies are ample.")

This Court should grant certiorari to decide whether the limitation of § 1997e(e) to retrospective, not prospective, remedies saves it from constitutional infirmity. Judicial rules on standing and mootness sharply limit the availability of injunctive relief for one-time violations of constitutional rights, no matter how fundamental the right or malicious the violation. This Court has ruled that an "equitable remedy [under 42 U.S.C. § 1983] is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again." *City of Los Angeles v. Lyons*, 461 U.S. 95, 110 (1983). It is not possible to demonstrate a "realistic threat" that a plaintiff will be wronged in the same way again based on one unconstitutional action. *Id.* Thus, there are no remaining remedies for plaintiff Wade, nor for the other plaintiffs who suffered cognizable constitutional injuries at the hands of prison guards.

In *Zehner*, the Seventh Circuit warned that "Congress may not effectively nullify the rights guaranteed by the

Constitution by prohibiting all remedies for the violation of those rights." 133 F.3d at 462. The rights of petitioners in this case have been effectively nullified. Section 1997e(e), as interpreted by the Eleventh Circuit, eliminates a judicial forum for plaintiffs' constitutional claims.

Accordingly, if applied to all constitutional claims, any "physical injury" requirement ("de minimis" or otherwise) will eliminate judicial forums for prisoners who have suffered racial discrimination, violations of bodily privacy, sexual harassment, denial of religious freedom, and psychological torture.

Plaintiffs do not assert that the Constitution mandates a tort remedy "for every claimed constitutional violation." *Cf. Harris*, 190 F.3d at 1288. Certainly the doctrine of qualified immunity shows that the principle of "effective redress to individual victims of constitutional violations" – *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) – is "not always unyielding." Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1737 (1991). But a different principle demands constitutional remedies that are adequate to keep government within the bounds of law. *See id.* at 1789 ("What would be intolerable is a regime of public administration that was systematically unanswerable to the restraints of law, as identified from a relatively detached and independent judicial perspective.").

There is no precedent for construing a statute to eliminate all retrospective remedies for a particular class of constitutional violations, particularly in the absence of any supporting Congressional intent. In this regard, the cases on constitutional remedies cited by the panel (190 F.3d at 1288-89) are illuminating in that they emphasize the availability of alternative avenues of relief as a key factor in deciding whether further remedies should be inferred. In *Bush v. Lucas*, 462 U.S. 367, 386 (1983), the Court declined to infer a *Bivens* remedy because Congress had provided a "comprehensive" alternative remedial scheme that provided "meaningful remedies for

employees who may have been unfairly disciplined for making critical comments about their agencies." First Amendment challenges to agency action were "fully cognizable within this system." *Id.* Because extensive legislative history supported the conclusion that Congress intended this "elaborate remedial system . . . constructed step by step, with careful attention to conflicting policy considerations" to address the sort of claims raised by the plaintiff, the Court concluded that it was not necessary or appropriate to "augment" this system "by the creation of a new judicial remedy for the constitutional violation at issue." *Id.* at 388. In *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988), the Court addressed a statutory remedial system (for the denial of Social Security disability benefits) that was, "if anything, considerably more elaborate than the civil service system considered in *Bush*" and provided "meaningful" remedies for the constitutional claimants.

In this case, by contrast, the Eleventh Circuit's construction of § 1997e(e) leaves no remedies for the plaintiffs. There is no separate statutory scheme, state or federal, under which they could pursue redress for the violations of their constitutional rights. Plaintiffs could not pursue their constitutional claims in state court.[15] *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1363-66 (1953) (stating that while Congress has "a wide choice in the selection of remedies," a prohibition on federal court consideration of certain constitutional claims is valid only "when the consequence is merely to force proceedings to be

---

15. Section 1997e(e) appears to restrict federal causes of action, such as 42 U.S.C. § 1983, not merely actions brought in federal court. The rights and remedies available in state court proceedings with respect to federal claims are defined by reference to federal law. *See* STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS, § 10.3 at 10.9 to 10.10 (state courts addressing § 1983 claims apply federal policies on damages); § 16.3 at 16.5 to 16.6 (same) (1997). Even if plaintiffs' § 1983 claims somehow survived in state court, defendants would be entitled to automatic removal to federal court, and then dismissal, in every instance. *See* 28 U.S.C. § 1441(a) and (b).

brought, if at all, in a state court"). As a consequence, they would have no ability to raise their claims in the U.S. Supreme Court. *See id.* at 1402 (Congress may not "destroy the essential role of the Supreme Court in the constitutional system," including its functions of ensuring supremacy and uniform application of federal law and protecting individuals from unconstitutional conduct by elected branches); Sager, *Constitutional Limitations*, *supra*, at 37-42 (same).

The legislative history of the PLRA, however, does not reveal any intent by Congress to so preclude judicial review of colorable constitutional claims. Quite the contrary: the intent of Congress was to do away with frivolous lawsuits filed by pro se prisoners. *See* 141 Cong. Rec. H1472-06, H1480 (statement of Rep. Canady discussing "chunky peanut butter" lawsuit); 141 Cong. Rec. S14413, S14414 (statement of Sen. Dole); *id.* at S14419 (statement of Sen. Kyl); *id.* at S14418 (statement of Sen. Hatch); *id.* at S14611, S14629 ("Top 10 Frivolous Lawsuits" presented by Sen. Kyl). The distinction between frivolous and meritorious claims was sharply drawn. Senator Hatch, for instance, stated during debate: "I do not wish to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised." *Id.* at 14627. There is no legislative history, clear or otherwise, to support the District Court's interpretation of § 1997e(e) as a bar to legitimate constitutional claims, such as those presented in this case.[16]

---

16. Congress promulgated the PLRA "to curtail abusive prisoner tort, civil rights and conditions litigation." *Mitchell v. Farcass*, 112 F.3d 1483, 1488 (11th Cir. 1997). This case, which involves representation by experienced civil rights counsel, allegations of official abuse at high levels, and matters of substantial public interest, cannot fairly be characterized as "abusive." Defendants are wrong to suggest, as they have throughout the proceedings below, that a broad application of § 1997e(e) in this case will curtail "frivolous prisoner litigation." The claims asserted by plaintiffs are not frivolous, as the Magistrate Judge recognized when he certified that plaintiffs have a "reasonable opportunity to prevail on the merits" of their *Complaint*. (R1-8). Defendants have not moved to dismiss this case for

(continued...)

The panel's construction of § 1997e(e) also raises important questions regarding the United States' international treaty obligations. Under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85 (ratified by the United States in 1990), and the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (ratified in 1992), the United States is obligated to prevent and provide effective remedies for acts of torture and cruel, inhuman or degrading treatment that is also prohibited by the U.S. Constitution.[17] A well-established rule of statutory construction requires that, absent a clear statement from Congress to the contrary, courts should interpret statutes in a manner that avoids derogation of the terms of these binding treaties. *See, e.g., Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).[18]

In enacting the PLRA, Congress gave no indication of any intent to violate the United States' treaty obligations by

---

(...continued)
failure to state a claim or on the basis of qualified immunity, arguments they would have undoubtedly made had they an arguable basis for asserting that plaintiffs' claims are frivolous.

17. The Senate has stated that for the purpose of U.S. law, the cruel, inhuman or degrading treatment described in the Convention Against Torture and the ICCPR is equivalent to "the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth amendments to the Constitution of the United States." 136 Cong. Rec. S17486-01 (Oct. 27, 1990); 138 Cong. Rec. S4781-01 (Apr. 2, 1992).

18. A similar rule of statutory construction requires that before courts interpret a statute to preclude judicial review of constitutional claims, the intent of Congress "to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988); *accord Weinberger v. Salfi*, 422 U.S. 749, 762 (1975); *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974). The Supreme Court has thus established a "super strong presumption against preclusion of constitutional claims." Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689, 730-31 (1990).

providing immunity to those who would psychologically torture prisoners. In fact, as the excerpts from the *Congressional* debate quoted above make clear, the drafters of the PLRA sought to curb frivolous litigation while keeping remedies available for legitimate constitutional claims.

Because the issues in this case are exceptionally important and have been resolved differently by lower courts, this Court should grant certiorari to review the decision below.

CONCLUSION

For the foregoing reasons, petitioners urge this Court to grant their petition for a writ of certiorari.

STEPHEN B. BRIGHT
COUNSEL OF RECORD
TAMARA H. SERWER
SOUTHERN CENTER FOR
HUMAN RIGHTS
83 Poplar Street, N.W.
Atlanta, Georgia 30303-2122
Telephone: (404) 688-1202

Attorneys for Petitioners

APPENDIX 1:
Harris v. Garner, 216 F.3d 970
(11th Cir. June 27, 2000)
(en banc)

Frederick Lamar HARRIS, Danny Chadwick, et. al., Plaintiffs-Appellants,

v.

Wayne GARNER, Commissioner of the Georgia Department of Corrections, A.G. Thomas, Director of Facilities Division of the Georgia Department of Corrections, et. al., Defendants-Appellees,

United States of America, Intervenor-Appellee.

No. 98-8899.
United States Court of Appeals,
Eleventh Circuit.
June 27, 2000.

Appeal from the United States District Court for the Middle District of Georgia.(No.97-00079-5-CV-4-HL), Hugh Lawson, Judge.

Before ANDERSON, Chief Judge, and TJOFLAT, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS and WILSON, Circuit Judges.

CARNES, Circuit Judge:

In an effort to stem the flood of prisoner lawsuits in federal court, Congress enacted the Prison Litigation Reform Act of 1995, Pub.L. No. 104-134, 110 Stat. 1321 (1996) ("PLRA"). One of the provisions of the PLRA states that:

> No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody

without a prior showing of physical injury.

42 U.S.C. § 1997e(e). We granted rehearing en banc in this case to decide whether the provision applies to lawsuits that are filed while the plaintiff is a confined prisoner but which are not decided until after he is released from confinement. We hold it does.

I. BACKGROUND

The factual and legal background of this case is set forth in some detail in the panel opinion, *Harris v. Garner*, 190 F.3d 1279, *vacated, reh'g granted en banc*, 197 F.3d 1059 (11th Cir.1999), and we will not repeat it at length here. Suffice it to say that eleven inmates of a Georgia prison filed a lawsuit claiming that their federal constitutional rights had been violated during a prison "shakedown." All eleven of them were confined in the prison when the lawsuit was filed, but by the time the district court entered judgment fifteen-and-a-half months later six of the inmate plaintiffs had been released from confinement.[1] The district court nonetheless applied section 1997e(e) to bar those six prisoners' claims for monetary relief,

---

[1]The lawsuit was filed on March 10, 1997, and judgment was entered on June 24, 1998. The six plaintiffs who were released from confinement during that interval are Danny Chadwick, Lenois Cook, William Dailey, Frederick Harris, Willie Hooks, and Farrell Nation. *See Harris*, 190 F.3d at 1283. The other five plaintiffs were still confined when judgment was entered in the district court but, according to the plaintiffs' brief, some of them have been released since then. All eleven of the plaintiffs are jointly represented in this appeal, but their counsel does not argue that any of those who were released *after* the date of the district court's judgment are, because of their release, free from the restrictions of section 1997e(e). Our references hereafter to "plaintiffs" are to those six who were released before the date of the district court's judgment, but the reasoning and holding of this opinion obviously apply as well to those who were released thereafter.

because they had not alleged the requisite physical injury.

A panel of this Court reversed the district court's judgment insofar as it applied section 1997e(e) to the monetary claims of those six plaintiffs, *see Harris,* 190 F.3d at 1284-85, but we granted rehearing en banc, *see Harris,* 197 F.3d 1059 (11th Cir.1999), which vacated the panel opinion. We now reinstate all of the panel opinion except for Part III A, which is the part that concerns this issue, and except for Part IV, the Conclusion, insofar as it relates to this issue. For the reasons that follow, we affirm the district court's judgment in part and vacate and remand it in part.

II. DISCUSSION

A. The Plain Language of the Statute

We begin our construction of section 1997e(e) where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision. *See United States v. Gilbert,* 198 F.3d 1293, 1298 (11th Cir.1999) (citing *United States v. Steele,* 147 F.3d 1316, 1318 (11th Cir.1998) (en banc) ("In construing a statute we must begin, and often should end as well, with the language of the statute itself.") (citations omitted)); *see also Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992) ("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others," which is "that courts must presume that a legislature says in a statute what it means and means in a statute what it says there;" and "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.") (citations and marks omitted).

Insofar as the issue before us is concerned, the operative

language of section 1997e(e) is "No federal civil action may be brought by a prisoner confined ...," and the loadbearing word is "brought," a derivative of the verb "bring" in the third person singular, passive voice. The dispositive question is whether "bring" means to commence or start a lawsuit, or instead means to maintain or continue it to conclusion.[2]

The standard legal dictionary answers that question as follows: "To 'bring' an action or suit has a settled customary meaning at law, and refers to the initiation of legal proceedings in a suit." Black's Law Dictionary 192 (6th ed.1990); *accord* 5 Words and Phrases, "Begun" (1968) (defining "begun" or "brought" to mean "commenced"). That is the generally accepted meaning of the term, and this is not the first time we have had occasion to say so. In *EEOC v. Eastern Airlines, Inc.*, 736 F.2d 635, 639 (11th Cir.1984), we were called upon to interpret section 7(c)(1) of the Age Discrimination in Employment Act, which provides that the right of any person "to bring" a private action under that statute terminates upon the commencement of an enforcement action by the EEOC. The defendant in the case argued that "to bring" means filing *or* continuing a lawsuit, so that once the EEOC starts an enforcement action, section 7(c)(1) bars a private plaintiff from continuing a previously filed lawsuit. *See id.* at 639. We rejected that position, agreeing instead with the Second Circuit's

---

[2]The panel opinion focuses on the definition of "prisoner" in section 1997e(h): "the term 'prisoner' means any person incarcerated or detained in any facility ..." *See* 190 F.3d at 1294. But it matters not if we characterize the status question in terms of whether the plaintiff is a prisoner, or in terms of whether the plaintiff is confined. Under the PLRA a confined plaintiff is a prisoner, and a plaintiff who is not confined is not a prisoner. The question is whether section 1997e(e) covers a plaintiff who is a confined prisoner at the time the lawsuit is filed but who becomes a non-confined, former prisoner by the time judgment is entered. As we explain in the text, the answer lies in the plain meaning of the word "bring."

decision in *Burns v. Equitable Life Assurance Soc. of the U.S.*, 696 F.2d 21, 23 (2d Cir.1982), that "the words 'to bring' mean only 'to commence,' rather than to 'commence or maintain.' " *See EEOC*, 736 F.3d at 639-40. The same is true here.

The Supreme Court has reached an identical conclusion about the meaning of "bring" and "brought." *Hoffman v. Blaski*, 363 U.S. 335, 341, 80 S.Ct. 1084, 1089, 4 L.Ed.2d 1254 (1960), involved 28 U.S.C. § 1404(a), the venue provision which permits the transfer of "any civil action to any other district or division where it might have been brought." The argument was made that because the statute is remedial, the words " 'where it might have been brought' should be held to relate not only to the time of the bringing of the action, but also to the time of the transfer." *See id.* at 342, 80 S.Ct. at 1089. The Supreme Court rejected that position, in large part because the statutory language was "unambiguous, direct [and] clear," *id.* at 343, 80 S.Ct. at 1089, and interpreting "might have been brought" to refer to anything other than the time the lawsuit was filed would "do violence to the plain words" of the statute. *Id.* at 344, 80 S.Ct. at 1090. The same is true here.

This is not new ground. The Supreme Court first broke it one hundred and seventeen years ago, when it had occasion to apply a legislative requirement that a lawsuit be "brought within 90 days after the decision" of a government official. The Court said this:

> A suit is brought when in law it is commenced, and we see no significance in the fact that in the legislation of congress on the subject of limitations the word "commenced" is sometimes used, and at other times the word "brought." In this connection the two words evidently mean the same thing, and are used interchangeably.

Goldenberg v. Murphy, 108 U.S. 162, 163, 2 S.Ct. 388, 389, 27 L.Ed. 686 (1883). The same is true here: "brought" means "commenced."

The decisions we have laid out show that for more than a century before the enactment of the PLRA, it was well established that "brought" and "bring" refer to the filing or commencement of a lawsuit, not to its continuation. This long history of established meaning is important, because we readily presume that Congress knows the settled legal definition of the words it uses, and uses them in the settled sense. *See Commissioner v. Keystone Consol. Industries, Inc.,* 508 U.S. 152, 159, 113 S.Ct. 2006, 2011-12, 124 L.Ed.2d 71 (1993) (explaining that Congress is presumed to be aware of settled judicial and administrative interpretations of words when it writes them into a statute); *Alabama v. Tennessee Valley Authority,* 636 F.2d 1061, 1065 (5th Cir.1981) ("When a word has a judicially settled meaning, it is presumed that Congress, by using that word in a statute, used it in that accepted sense.") (citation omitted).

The meaning that we give section 1997e(e)'s "may be brought"—the plain and ordinary meaning of the words—is also mandated by our recent decision about the meaning of "shall be brought" as that phrase is used in another section of the same legislation. Congress included in the PLRA an administrative exhaustion requirement which provides that "No action shall be *brought* with respect to prison conditions ... until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). In *Miller v. Tanner,* 196 F.3d 1190, 1193 (11th Cir.1999), we interpreted the word "brought" in section 1997e(a) to mean the filing of the lawsuit, holding: "An inmate incarcerated in a state prison, thus, must first comply with the grievance procedures established by the state department of corrections before *filing* a federal lawsuit under section 1983." (emphasis added). Indeed, the panel

opinion in this case agrees with that interpretation. *See Harris,* 190 F.3d at 1286 (holding that the "brought" language in section 1997e(a) "means that a prisoner must exhaust all administrative remedies that are available before *filing* suit ....") (emphasis added).

The language we have quoted from the *Miller* decision establishes that "brought," as used in section 1997e(a)'s "No action shall be brought ..." language means filed. And the same word means the same thing in section 1997e(a)'s "No federal civil action shall be brought ..." language. *See Atlantic Cleaners & Dyers v. United States,* 286 U.S. 427, 433, 52 S.Ct. 607, 609, 76 L.Ed. 1204 (1932) ("[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning."); *Doctors Hosp., Inc. of Plantation v. Bowen,* 811 F.2d 1448, 1452 (11th Cir.1987) ("A presumption is made that the same words used in different parts of an act have the same meaning.").

Our interpretation of section 1997e(e) is also consistent with the decisions of other courts of appeal which have interpreted that and similarly worded other provisions of the PLRA. In *Kerr v. Puckett,* 138 F.3d 321, 322-23 (7th Cir.1998), the Seventh Circuit held that application of the section 1997e(e) bar depends on the confinement status of the plaintiff at the time the lawsuit was commenced. The *Kerr* case involved a prisoner who was no longer confined at the time he *filed* the lawsuit, having already been released on parole. Based on the plain language of the statute, the Seventh Circuit concluded that Congress intended to exclude the possibility "that 'prisoner' refers to the plaintiff's status at the time of the injury rather than at the time the litigation begins." *Id.* at 323. The Court held section 1997e(e) did not apply, because "Kerr brought the suit after he had been released on parole and was therefore no longer 'confined in a jail, prison, or other correctional facility.' " *Id.* at 322. Only because Kerr was not confined at the time he filed

his lawsuit did the Seventh Circuit hold that section 1997e(e) did not apply.

Under the reasoning in *Kerr*, the Seventh Circuit would reach the opposite result, and the same one we do here, where the plaintiff was confined when he filed the lawsuit. It is confinement status at the time the lawsuit is "brought," i.e., filed, that matters. The same rule of decision has been applied by the other circuits that have had occasion to speak to the issue. *See Greig v. Goord*, 169 F.3d 165, 167 (2d Cir.1999) ("Appellees acknowledge that Greig was a parolee *at the time he filed his complaint* ....") (emphasis added); *Doe v. Washington County*, 150 F.3d 920, 924 (8th Cir.1998) ("*When he filed this complaint*, Doe was neither incarcerated nor detained in any jail, prison, or correctional facility.") (emphasis added). Plaintiffs have been unable to cite a single decision of any district court or court of appeals holding that section 1997e(e) turns upon the confinement status of the plaintiff at any time other than the time the lawsuit is filed.

Not only is our conclusion about the meaning of "brought" reinforced by the decisions of the other circuits that have interpreted section 1997e(e), it is also consistent with decisions of the circuits that have interpreted "brought" and "bring" as those words are used in other provisions of the PLRA. Several of those decisions concern the PLRA's "three strikes" section. That section, codified as 28 U.S.C. § 1915(g), provides that a prisoner may not "bring a civil action or appeal" in forma pauperis if he has on three or more occasions brought an action or appeal that was dismissed on grounds it was frivolous, malicious, or failed to state a claim, unless the prisoner is under imminent danger of serious physical injury.

The words "bring a civil action or appeal" in section 1915(g) have been held to mean the filing of a suit or appeal, not its continuation. *See Chandler v. D.C. Dept. of Corrections*,

145 F.3d 1355, 1359 (D.C. Cir.1998). ("[W]e hold that the phrase 'appeal a judgment' in subsection (g) refers to the initiation of an appeal," and "the phrase 'bring a civil action' means to initiate a suit."); *Banos v. O'Guin*, 144 F.3d 883, 885 (5th Cir.1998) ("In order to implement this statutory scheme, we must determine if danger exists *at the time the plaintiff seeks to file his complaint or notice of appeal IFP.*") (emphasis in original); *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th Cir.1998) ("As the statute's use of the present tense verbs 'bring' and 'is' demonstrates, an otherwise ineligible prisoner is only eligible to proceed IFP if he is in imminent danger *at the time of filing.*") (emphasis in original); *Abdul-Wadood v. Nathan*, 91 F.3d 1023, 1025 (7th Cir.1996) (holding that section 1915(g) "governs bringing new actions or filing new appeals—the events that trigger an obligation to pay a docket fee—rather than the disposition of existing cases").

Decisions interpreting 28 U.S.C. § 1915(b)(1), the PLRA's full payment provision, are also relevant. That section states: "if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee." 42 U.S.C. § 1915(b)(1). Two of the three circuits which have interpreted that "bring" language have held it means the provision applies to prisoners who were confined when they filed a notice of appeal even though they were released before their appeal was decided. In *Gay v. Texas Dept. of Corrections State Jail Div.*, 117 F.3d 240, 242 (5th Cir.1997), the Fifth Circuit, "[b]ased on the plain language of § 1915(b)(1)" and that Court's "desire to put some teeth into the PLRA's front-end deterrent," held that the filing fee requirement applied to a former prisoner, because when he filed an appeal he was confined, even though he was released before his appeal was decided. That he "was released from prison after he filed his notice of appeal is irrelevant," the Fifth Circuit concluded. *Id.* The Seventh Circuit reached the same conclusion in *Robbins v. Switzer*, 104 F.3d 895, 897-98 (7th Cir.1997) ("Robbins was

a prisoner when he filed ..., and therefore is obligated to pay. His current status does not alter the fact that he was a prisoner when he filed the appeals."). *But see McGann v. Comm'r, Social Security Administration,* 96 F.3d 28 (2d Cir.1996) (reaching the opposite conclusion); *see also id.* at 30-31 (Miner, J., dissenting) ("My dissent is compelled by the simple and familiar principle that when the language of a statute is plain and enacted within the constitutional authority of Congress, as it is here, the sole function of the courts is to enforce it according to its terms.") (internal marks and citation omitted).

In expressing its intent about which civil actions section 1997e(e) bars, Congress said it bars those federal civil actions "brought by a prisoner confined," not those continued by, or litigated to judgment by a prisoner confined. *Cf., W.J. Lake & Company v. King County,* 4 Wash.2d 651, 104 P.2d 599 (Wash.1940) (interpreting the statutory phrase "the court before whom such action is brought" and holding: "The statute cannot be extended beyond its plain terms. Had the word 'pending' been used, instead of brought, a different question would be presented. This action was not 'brought' before this court.") The plaintiffs and the dissenting opinion, in effect, ask us to rewrite the clear and unequivocal language Congress used, so that it will read: "No federal civil action may be brought by a prisoner confined ... *except if he is no longer confined at the time judgment is entered in the case.*" (emphasized language added). That is exactly how the provision would read if it meant what they say it does. If Congress had wanted to weaken the section 1997e(e) bar by adding that exception, it easily could have done so. We will not do to the statutory language what Congress did not do with it, because the role of the judicial branch is to apply statutory language, not to rewrite it. *See Badaracco v. Commissioner,* 464 U.S. 386, 398, 104 S.Ct. 756, 764, 78 L.Ed.2d 549 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible

of improvement."); *Blount v. Rizzi,* 400 U.S. 410, 419, 91 S.Ct. 423, 429, 27 L.Ed.2d 498 (1971) ("it is for Congress, not this Court, to rewrite the statute"); *Korman v. HBC Florida, Inc.,* 182 F.3d 1291, 1296 (11th Cir.1999) ("It is not the business of courts to rewrite statutes.").[3]

B. The Congressional History

When the import of the words Congress has used is clear, as it is here, we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language. *See United States v. Gonzales,* 520 U.S. 1, 117 S.Ct. 1032, 1035, 137 L.Ed.2d 132 (1997) ("Given the straightforward statutory command, there is no reason to resort to legislative history."); *Ratzlaf v. United States,* 510 U.S. 135, 147-48, 114 S.Ct. 655, 662, 126 L.Ed.2d 615 (1994) ("There are, we recognize, contrary indications in the statute's legislative history. But we do not resort to legislative history to cloud a statutory text that is clear."); *Barnhill v. Johnson,* 503 U.S. 393, 401, 112 S.Ct. 1386, 1391, 118 L.Ed.2d 39(1992) ("To begin, we note that appeals to statutory history are well taken only to resolve statutory ambiguity."); *United States v. Steele,* 147 F.3d 1316, 1318 (11th Cir.1998) (en banc) ("Where the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said.").

Notwithstanding that well-recognized and bedrock principle, sometimes judges who find that legislative history

---

[3]The dissenting opinion labels our interpretation of the plain language of section 1997e(e) "judicial activism," a label which would more aptly apply to an interpretative approach that writes language into a statute. Our interpretation neither adds anything to nor subtracts anything from the statutory language.

supports and complements the plain meaning of statutory language cannot resist the temptation to set out that history. We have given in to that temptation more than once. *See, e.g., United States v. Gilbert,* 198 F.3d 1293, 1299 (11th Cir.1999) ("Given the plain meaning of the statutory language, we could bypass any consideration of legislative history. Nevertheless, for the sake of completeness, and because this is our first occasion to decide a Hyde Amendment case, we will look at that history.") (internal marks and citations omitted). We find the temptation to set out the legislative history of the PLRA irresistible—even though the plain meaning of the statutory language in section 1997e(e) makes it irrelevant—because we want to correct what we believe is a misreading or misapplication of that legislative history in the panel opinion, *see Harris,* 190 F.3d at 1284-85, and in the dissenting opinion.[4]

The panel opinion says that "Congress manifestly wanted to draw a bright line distinction between those who are prisoners, and those who are not prisoners." *Id.* at 1284-85. That statement is true as far as it goes, of course, but the question is when did Congress want a plaintiff's status as a prisoner or non-prisoner to be determined for purposes of the PLRA's restrictive provisions. The legislative history of the PLRA shows that Congress was concerned with the number of

---

[4]The dissenting opinion takes us to task for discussing the legislative history as it reflects the clear Congressional purpose behind section 1997e(e), and charges that it is inconsistent for us to point out that the legislative history reinforces our conclusion about the plain meaning of the statutory language. *See* Dissenting Op. at 2762-63. So long as legislative history is not used to contradict the plain meaning of the statutory language, we see no inconsistency in pointing out that both the statutory language and legislative history lead to the same interpretative result. Besides, if there were any inconsistency in relying upon both the statutory language and legislative history, the panel opinion would not have done it, *see* 190 F.3d at 1284-85, nor would the dissenting opinion do it, *see* Dissenting Op. at 2761-62, 2765-66.

prisoner cases being *filed*, and its intent behind the legislation was to reduce the number cases *filed*, which is why Congress made confinement status at the time of *filing* the decisive factor.

Congress' concern and intent is reflected in the floor statements of Senators Dole and Kyl, two of the principal architects of the PLRA.[5] Their statements reveal that it was the filing of the prisoner lawsuits that Congress viewed as a problem and set about to solve. *See* 141 Cong. Rec. S14408-01, S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) (explaining that the number of prisoner suits filed "has grown astronomically—from 6,600 in 1975 to more than 39,000 in 1994."); 141 Cong. Rec. S7498-01, S7524 (daily ed. May 25, 1995) (statement of Sen. Dole) ("Frivolous lawsuits *filed* by prisoners tie up the courts, waste valuable judicial and legal resources, and affect the quality of justice enjoyed by the law-abiding population.") (emphasis added); 141 Cong. Rec. S14408-01, S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl) ("Today's system seems to encourage prisoners to *file* with impunity.") (emphasis added).

Confined prisoners have little to lose by filing frivolous

---

[5]The evolution of the legislative language itself provides little guidance. In its original form, the provision that would become section 1997e(e) limited recovery in civil actions brought "by an adult convicted of a crime confined in a jail, prison, or other correctional facility." S. 866, 104th Cong. 1st Sess. § 7A (1995). The remarks during floor debate are more important than usual, as this Court has explained: "[B]ecause Congress enacted [the] PLRA as a rider to an appropriations bill, floor debate is more indicative of legislative intent than it otherwise would be, especially where the floor statements in favor of the bill remain uncontested." *Alexander v. Hawk*, 159 F.3d 1321, 1325 n. 8 (11th Cir.1998) (internal marks and citations omitted). The statements of Senators Dole and Kyl are due special consideration, because they, along with Senators Hatch, Hutchison, and Abraham, were the architects of the PLRA. *See* 142 Cong. Rec. S3703-01, S3704 (daily ed. April 19, 1996).

lawsuits, and that is why Congress made the confinement status of the plaintiff at the time a lawsuit is filed the controlling factor. *See* 141 Cong. Rec. S7498-01, S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl) ("*Filing* frivolous civil rights lawsuits has become a recreational activity for long-term residents of our prisons.") (emphasis added); 141 Cong. Rec. S7498-01, S7524 (daily ed. May 25, 1995) (statement of Sen. Dole) ("[P]risoners will now 'litigate at the drop of a hat,' simply because they have little to lose and everything to gain." (quoting Chief Justice Rehnquist)). As the Seventh Circuit has explained, "Congress deemed prisoners to be pestiferous litigants because they have so much free time on their hands and there are few costs to filing suit." *Kerr v. Puckett*, 138 F.3d at 323. The distinction between current and former prisoners makes sense for that reason, and because "[o]pportunity costs of litigation rise following release, diminishing the need for special precautions against weak suits." *Id.*; *see also Madrid v. Gomez*, 190 F.3d 990, 996 (9th Cir.1999) ("[I]t is certainly conceivable that, because of significant potential gains and low opportunity costs, prisoners generally file a disproportionate number of frivolous suits as compared to the population as a whole."); *Tucker v. Branker*, 142 F.3d 1294, 1301 (D.C.Cir.1998) (noting that "prisoners have a lower opportunity cost for their time than other indigent (and in all likelihood, non-indigent) litigants").

Congress made confinement status at the time of filing the criterion, because that is the point at which the difference in opportunity costs was causing the problem Congress was trying to solve: the large number of filings. *See generally Christiansen v. Clarke*, 147 F.3d 655, 658 (8th Cir.1998) ("Because prisoners, even under the PLRA, initially pay a reduced filing fee (they receive, in effect, an interest free loan to pay the full filing fee), *see* 28 U.S.C. § 1915(b), and because prisoners have excessive amounts of free time on their hands, they are more likely than paying plaintiffs to *file* meritless

suits.") (emphasis added). Given the legislation's overriding goal of reducing the number of prisoner cases filed, it would have made little or no sense for Congress to have made confinement status at any time after filing determinative.

In considering why Congress chose to peg the application of section 1997e(e) on confinement status at the time of filing, it is worth mentioning that confinement status can change several times during the course of the months or years it takes the overburdened district courts to enter judgment in a case. Consider this hypothetical and how episodic the application of section 1997e(e) would be if post-filing confinement status were the criterion: A plaintiff is confined when he files the lawsuit (the section applies); shortly thereafter he is released on parole (the section no longer applies); later he is picked up and jailed on a parole violation charge (the section applies again); he bails out after a few days (the section no longer applies); but after a hearing his parole is revoked, and he is returned to prison (the section applies again).[6] No one has yet explained to us why Congress would

---

[6]The dissenting opinion at 2772 n. 18 dismisses our hypothetical as "somewhat exotic." To the contrary, the latest information shows that more than 694,000 prisoners are on parole in this country. *See* Thomas P. Bonczar & Lauren E. Glaze, U.S. Dept. of Justice, *Probation and Parole in the United States, 1998* 5 (1999). Many are arrested and incarcerated for parole violations, then make bail, and so forth. Indeed, in the latest year for which statistics are available, over 155,000 of the nation's state prisoners were parole violators. *See* Robyn L. Cohen, U.S. Dept. of Justice, *Probation and Parole Violators in State Prisons, 1991* 2 (1995). Although no bail statistics are available, for those 155,000 potential plaintiffs there was at least initial incarceration, release from incarceration, and return to incarceration.

Thus, our parole violation hypothetical describes a situation occurring with far greater frequency than the "even worse scenario" upon which the dissent relies: a scenario where a prisoner has filed a claim for monetary damages, has gotten past a motion to dismiss on the physical injury requirement, has gotten past summary judgment on that issue, and goes to trial on that issue but is released before judgment is entered against him on

have wanted the application of an important provision, such as section 1997e(e), to be such an on-again, off-again thing.

Last year alone, there were 3,465 prisoner lawsuits filed in the district courts of this circuit. *See* Admin. Office of the U.S. Courts, Statistical Tables for the Federal Judiciary, Table C-3, 34-35 (for the twelve-month period ending June 30, 1999).[7] As this case illustrates, it often takes more than a year after filing for judgment to be entered by the district court in such a case. The best figures available indicate that more than 47,000 state and federal prisoners were released from confinement in this circuit in the most recent twelve-month period.[8] Many of the tens of thousands of prisoners who are

---

it. *See* Dissenting Op. at 2772. If the inmate is not released until after judgment is entered against him on the physical injury issue then the dissent's scenario is not a criticism of our interpretation of § 1997e(e), because everyone (including the dissent) agrees that § 1997e(e) applies with full force where judgment is entered before the release, even if by only a day. Moreover, the criticism the dissenting opinion attempts to mount through use of its scenarios would not apply even where the inmate was released before judgment, unless the inmate had not suffered any physical injury. All agree that the § 1997e(e) bar has no application at all where there is physical injury. The only cases that fit the dissent's "even worse scenario" are those in which the plaintiff has not suffered any physical injury but nonetheless makes it past a motion to dismiss on that issue, then makes it past a summary judgment motion on that issue, then loses at trial on that issue, but is released before judgment is entered. That is truly a "somewhat exotic" hypothetical.

[7]The statistic we cite does not include 28 U.S.C. §§ 2241, 2254, and 2255 filings, because they are not covered by the PLRA. *See Anderson v. Singletary,* 111 F.3d 801, 805 (11th Cir.1997) ("Congress promulgated the PLRA to curtail prisoner tort, civil rights and conditions litigation, not the filing of habeas corpus petitions.")

[8]The state corrections departments and the Federal Bureau of Prisons have different reporting years, but using the most recently completed reporting year for each, the figures are as follows: 8,421 state prisoners were

released from confinement each year in this circuit alone undoubtedly have federal lawsuits pending at the time of their release. The magnitude of the problem illustrates the wisdom of Congress' deliberate decision to draw the confinement line—with plain and unequivocal language—where it did in section 1997e(e), which is at the point of filing. We have no authority to move that line.[9]

---

released from confinement in Alabama, *see* Alabama Dep't of Corrections, Monthly Reports (Oct.1998—Sept.1999 data); 15,213 state prisoners were released from confinement in Georgia, *see* Georgia Dep't of Corrections, Inmate Statistical Profile—Prison Departures (1998); 23,025 state prisoners were released from confinement in Florida, *see* Florida Dep't of Corrections, Inmate Releases, Annual Report (1999); and 1,508 inmates were released from confinement in federal prisons in this circuit in calendar year 1999 (federal release figures obtained from the Southeast Regional Office of the Federal Bureau of Prisons).

[9]The dissenting opinion constructs elaborate, multi-premised scenarios in an effort to show how its approach would yield better policy results than the one we think Congress embodied in section 1997e(e). *See* Dissenting Op. Part III at 2770-72. There are many flaws to the reasoning underlying the dissent's scenarios. To begin with, one of its essential factual premises is that a substantial number of prisoners who file complaints that fall within the scope of the provision will make it past a motion to dismiss, and past summary judgment to trial on the physical injury issue. Not only that, but the dissent posits that they will be released before judgment is entered. *See* Dissenting Op. at 2771. That sounds to us like an unlikely scenario. *See* supra, at 2741 n. 6. The dissent cannot point to anything in this record or elsewhere that indicates those facts are likely to occur with any regularity. Those facts do not represent the typical case, or this case, either. These six plaintiffs were all released before the magistrate judge had even made any recommendation on the Rule 12(b)(6) motion to dismiss the complaint under section 1997e(e). Nor is there any apparent basis for the dissent's assumption that in the typical case a substantial amount of effort will be invested in determining whether the plaintiff has suffered physical injury. Here, that question was decided in a motion to dismiss, and even if the case had gone to summary judgment, there is no reason to believe that much effort would have been required to determine whether there was a triable issue of physical injury.

Because section 1997e(e) applies only to claims filed while an inmate is confined, it does not prevent a former prisoner from filing after release a monetary damages claim for mental and emotional injury suffered while confined, without

---

A second problem with the dissent's reasoning relating to the scenarios it puts forward is that the very same reasoning argues just as strongly against application of section 1997e(e) in situations to which the provision indisputably does apply. All the effort the dissent's scenarios posit also will have been spent in those cases in which the claim for monetary relief is held to be barred under section 1997e(e) in a judgment entered *before* the inmate plaintiff is released. Yet, no one disputes that if the judgment is entered before the plaintiff is released, section 1997e(e) applies with full force, and that is true even if the release happens just after judgment or while the case is on appeal. *See* supra, at 2734 n. 1. Yet, according to the dissent's reasoning, all of that adjudication of the physical injury issue will have been a total waste, *see* Dissenting Op. at 2750 ("the awful burden"), because it predicts the case will be re-filed after the plaintiff's release and the monetary damages claim will have to be re-litigated free of the physical injury requirement of section 1997e(e). *See* Dissenting Op. at 2772 ("All of the court's work in determining whether the plaintiff suffered physical injury will have been for naught, because physical injury will no longer be an element of the plaintiff's claim."). Thus, it appears that the dissenting opinion's stated policy disagreement applies equally to any application of section 1997e(e).

A third defect with the dissent's posited scenarios and reasoning is that its fundamental premise is at war with the congressional premise behind section 1997e(e). The dissent's scenarios assume, without any basis, that all or most plaintiffs who file complaints while incarcerated and have them dismissed under section 1997e(e) will re-file those complaints after they are released. That is the only way that there will be the duplication of effort and "the awful burden" on the system the dissent fears. Yet, as we all agree, the congressional judgment behind section 1997e(e) is that because of a difference in opportunity costs, a released inmate is far less likely to file a lawsuit than an incarcerated inmate. *See Harris,* 190 F.3d at 1284-85; supra, at 2739-41; Dissenting Op. at 2765-66. The dissenting opinion's scenarios and the assumptions underlying them reveal that the dissent's disagreement with our position is actually a disagreement with what we believe to be the policy decisions and attendant judgments Congress made in enacting section 1997e(e).

a prior showing of physical injury. Accordingly, dismissal under this statutory provision of a claim that is filed during confinement should be without prejudice to re-filing the claim if and when the plaintiff is released. *See Zehner v. Trigg,* 952 F.Supp. 1318, 1335 (S.D.Ind.1997) (dismissal without prejudice of section 1997e(e) barred claim), *aff'd,* 133 F.3d 459 (7th Cir.1997). Some, but not all, claims will be re-filed after the plaintiff is released, and more total effort may well be required to adjudicate those particular claims that are re-filed than if the section 1997e(e) bar did not exist. But the provision reflects Congress' belief that because of the difference in opportunity costs, a substantial number of such claims will not be re-filed after release and that will result in a significant net savings to the judicial system. That is the judgment Congress made about what the difference in opportunity costs between inmates and former inmates would mean, and it is the judgment underlying section 1997e(e).

C. The Purported Amendment or Supplement

The panel opinion says that after these six plaintiffs were released, and before the district court entered judgment against them, the court permitted them to amend the complaint to indicate their new status as former prisoners. That, according to the panel opinion, makes all the difference and allows these plaintiffs to escape the section 1997e(e) bar. *See Harris,* 190 F.3d at 1284. We are not entirely convinced that the complaint was actually amended in that or any other way.[10] The panel

---

[10]No motion to amend the complaint was filed, and neither the magistrate judge nor the district court said the complaint had been amended. The plaintiffs did file a motion to withdraw their request for injunctive relief, which simply acknowledged that there was no longer any need for an injunction in view of their release. But the court did not formally rule on that motion. Instead, the magistrate judge (whose recommendations were adopted by the district court without relevant change) concluded: "These

opinion had no doubt there was an amendment. Now, the dissenting opinion says that there is no doubt that there was not an amendment, but a supplement. It appears that the requirements of Rule 15(d) were not met.[11] But we are convinced that any such amendment or supplement is irrelevant to the application of section 1997e(e), and so we will assume for purposes of discussion that before judgment was entered against the plaintiffs the complaint was amended or supplemented to reflect that they had been released from confinement after they filed the lawsuit.

The reason such an amendment or supplement makes no difference is that, for all of the reasons we have already discussed, the confinement status of the plaintiffs at any time after the lawsuit is filed is beside the point. The status that

---

plaintiffs cannot obtain monetary relief because they alleged only mental or emotional injuries and their injunctive claims are moot since they have been released from prison." [R & R at 5]. The claims were dismissed with prejudice.

[11] The rule provides that a supplement to the pleadings may be permitted "[u]pon motion of a party." Fed.R.Civ.P. 15(d). There was no motion to supplement the pleadings. The rule also says that the court may permit a supplement "upon reasonable notice." *Id.* We can hardly say that the defendants had reasonable notice that a supplement to the pleadings was being considered when the first time it occurred to anyone that it was a Rule 15(d) supplement to the pleadings is when the case reached the en banc stage of appeal. The thought that a Rule 15(d) supplement was involved apparently never occurred to the parties in the district court, to the district judge, or to the panel judges. The rule also charges the district court with conditioning permission to supplement the pleadings upon "such terms as are just." *Id.; see also* Fed. R.. Civ. P. 15(d) advisory committee note ("As in other situations where a supplemental pleading is offered, the court is to determine in the light of the particular circumstances whether filing should be permitted, and if so, upon what terms.") The district court did not do what the rule requires a court to do before permitting a supplemental pleading, apparently because the court was not aware that it was being requested to permit a supplement to the pleadings.

counts, and the only status that counts, for purposes of section 1997e(e) is whether the plaintiff was a "prisoner confined in a jail, prison, or other correctional facility" at the time the federal civil action was "brought," i.e., when it was filed. It is an undisputed historical fact that all of these plaintiffs were confined in a Georgia prison or correctional facility at the time their complaint was filed. No amendment or supplement to a pleading can change a historical fact, and the one in question did not purport to do so. The amendment or supplement did not deny that these six plaintiffs had been confined prisoners at the time the lawsuit was filed. All it noted was that they had been released since the lawsuit was filed which, of course, means that they were no longer "prisoner[s] confined." But that change in their status after the lawsuit was filed is irrelevant under section 1997e(e).

As we have discussed, the intent of Congress behind section 1997e(e) was to reduce the number of prisoner lawsuits *filed*, and specifically to reduce the number that are *filed* because the opportunity costs of *filing* a lawsuit are lower for an incarcerated plaintiff than for one in the free world. The opportunity costs of *filing* a lawsuit do not change after it has been *filed*. That is why the release of an inmate after he has *filed* a lawsuit is irrelevant for purposes of section 1997e(e).[12]

---

[12]The opening and penultimate paragraphs of the dissenting opinion characterize our holding as being that the district court properly dismissed the complaint under section 1997e(e) "even though that section no longer applies to plaintiffs because they are no longer prisoners within the meaning of the Act," Dissenting Op. at 2749 & 2774. Of course anyone would dissent from a holding that a statute was properly applied to cases to which it no longer applies. That is not what we hold. Instead, as explained in the text above, we hold that because these plaintiffs were incarcerated at the time they filed their complaint, section 1997e(e) applies to them even though they were later released before any judgment was entered in the case. Or to put it in the same terms the dissenting opinion uses, we hold that the district court properly dismissed the complaint because section 1997e(e) does apply

The opposing position essentially treats section 1997e(e) as if Congress had been concerned not with the opportunity costs of filing a lawsuit, but instead with the opportunity costs of continuing an already filed lawsuit. Only if that were true would an amendment or supplement noting that the plaintiff had been released after filing the lawsuit make any difference. But most of the damage to the overburdened system is already done, or put in motion, after the lawsuit is filed. That is why Congress made the operative fact the plaintiff's status at the time of filing, not status at the time the lawsuit is decided. We know Congress did that, because it said: "No federal civil action may be *brought* by a prisoner confined ..." (emphasis added), and as we have explained "brought" means filed; it does not mean continued or maintained after filing. Congress chose its words and we will heed them.

The difference between our position and that of the dissenting opinion is crystalized in its proposition that a prisoner who files his claim in direct contravention of section 1997e(e) while he is incarcerated ought to be allowed to continue with that claim after release, because "[p]risoners who are released while their suit is still pending immediately begin to face the same opportunity costs of prosecuting their action as everyone else." Dissenting Op. at 2766. Congress could have written the statute to focus on the opportunity costs of prosecuting actions, but it did not. Instead, Congress aimed at the opportunity cost of filing actions. That is clear in the language Congress used to express its will ("brought," not "prosecuted" or "continued"), and in the legislative history, *see* 141 Cong. Rec. S7498-01, S7524 (daily ed. May 25, 1995) (statement of Sen. Dole) ("Frivolous lawsuits *filed* by prisoners tie up the courts, waste valuable judicial and legal resources, and affect the quality of justice enjoyed by the law-abiding

---

to it.

population.") (emphasis added); 141Cong. Rec. S14408-01, S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl) ("Today's system seems to encourage prisoners to *file* with impunity.") (emphasis added).

If there were a conflict between Federal Rule of Civil Procedure 15 and the PLRA, the rule would have to yield to the later-enacted statute to the extent of the conflict. *See Mitchell v. Farcass,* 112 F.3d 1483, 1489 (11th Cir.1997) (a PLRA case) ("a statute passed after the effective date of a federal rule repeals the rule to the extent that it actually conflicts." (quoting and adopting the holding of *Jackson v. Stinnett,* 102 F.3d 132, 135 (5th Cir.1996))); *Floyd v. United States Postal Serv.,* 105 F.3d 274, 278 (6th Cir.1997). But there is no conflict. In proper circumstances and when the requirements contained in Rule 15 are met, the rule does permit amendments or supplements to pleadings in order to bring to the attention of the court changes in the facts, but other law—in this instance section 1997e(e)—determines whether those changes in the facts make any difference. As we have said, the change in the facts (the post-filing release of the plaintiffs) that this purported amendment or supplement brought to the attention of the court makes no difference whatsoever under section 1997e(e).

Rule 15(d) does authorize a court to permit a party to supplement a pleading "even though the original pleading is defective in its statement of a claim for relief or defense." But that rule does not and cannot overrule a substantive requirement or restriction contained in a statute (especially a subsequently enacted one). The decisions the dissenting opinion relies upon are distinguishable. None of them involved a statutory purpose and requirement that the plaintiff be made to bear the differential opportunity cost of a re-filing in order to discourage filings, which is what section 1997e(e) is all about. In none of those decisions would the purpose behind the statutory requirement be defeated by treating subsequently occurring

facts as though they had occurred before the complaint was filed. That is the situation we would have here, and it was not present in any of the decisions upon which the dissenting opinion is based.

Take, for example, *Mathews v. Diaz,* 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976). The statutory requirement that an applicant for Social Security benefits commence a civil action within sixty days after the mailing of the decision which is being appealed, *see* 42 U.S.C. § 405(g), is obviously intended to do what all filing deadlines do—ensure that the action is promptly filed while the facts and issues are fresh, and bring to the process to a close sooner instead of later. One of several plaintiffs in that case had joined in a civil action challenging an eligibility provision before he had actually filed an application with the Secretary of the Department of Health, Education, and Welfare. The Supreme Court held that plaintiff's subsequent filing of the application sufficed, and that the Secretary "could waive the exhaustion requirements which this provision contemplates" and had done so in that case. *Id.* at 75-76, 96 S.Ct. at 1889. As the Supreme Court explained, "For jurisdictional purposes, we treat the [Secretary's] stipulation in the District Court as tantamount to a decision denying the application and as a waiver of the exhaustion requirement." *Id.* at 76-77, 96 S.Ct. at 1890.

The defendants in our case have stipulated away or waived nothing about section 1997e(e). More fundamentally, permitting the plaintiff in *Mathews* to join a civil action early, which is what happened in that case, does not undermine the statutory purpose that an action be filed promptly, and the sooner the better. Allowing that plaintiff to proceed was in keeping with a statutory purpose. *See id.* at 75 n. 9, 96 S.Ct. at 1889 n. 9. By contrast, in this case permitting the plaintiffs to proceed would undermine the statutory purpose of prohibiting these types of claims from being *filed* by prisoners with nothing

but time on their hands.

The other supplemental pleading cases the dissenting opinion relies upon are distinguishable in the same way as *Mathews*. In all of them Rule 15(d) was used to further the statutory purpose involved, not to defeat it. At the risk of being repetitive, the statutory purpose behind section 1997e(e) is to prevent prisoners from filing a certain type of claim, and to require that they shoulder the differential opportunity costs of filing that type of claim in the free world if they are released.

An analogy may be useful to illustrate our point here. It is well established that the only citizenship of the original parties that matters for purposes of determining whether diversity jurisdiction exists is their citizenship at the time the lawsuit is filed; any changes in a party's citizenship that occur after filing are irrelevant. *See Freeport-McMoRan, Inc. v. KN Energy, Inc.*, 498 U.S. 426, 428, 111 S.Ct. 858, 860, 112 L.Ed.2d 951 (1991); *Wichita R.R. & Light Co. v. Public Utilities Comm'n of Kansas*, 260 U.S. 48, 54, 43 S.Ct. 51, 53, 67 L.Ed. 124 (1922) ("Jurisdiction once acquired on that ground is not divested by a subsequent change in the citizenship of the parties."). That is the substantive law. If an amendment or supplement to the pleadings is offered to show that the citizenship of one of the original parties has changed since the lawsuit was filed, that amendment or supplement should be denied as futile. The reason it should be denied as futile—and the reason it will make no difference if permitted—is that the parties' citizenship at the time of filing determines that legal issue, which is whether diversity of jurisdiction exists. There is no conflict between the law that citizenship at the time of filing governs for diversity purposes and the liberal allowance of amendments or supplements to the pleading under Rule 15; it is simply that the change in the facts which the amendment or supplement in our diversity jurisdiction hypothetical seeks to bring to the court's attention is irrelevant under the governing

law. The same is true here.

The dissenting opinion points out that the present case is not a diversity case. *See* Dissenting Op. at 2759-60, n. 11. That is true, but neither is it a social security case or a copyright case, or any of the other kinds of cases involved in the decisions the dissent relies upon. *See id.* at 2757-59. The dissenting opinion places particular reliance upon a copyright case, *M.G.B. Homes, Inc. v. Ameron Homes,* 903 F.2d 1486 (11th Cir.1990), and it quotes with approval how that opinion swept aside the district court's lack of jurisdiction with the statement that it "was, at most, technically without jurisdiction." Dissenting Op. at 2758 (quoting 903 F.2d at 1489). That is a problematic approach given the fact that virtually all jurisdictional rules and issues are "technical." But we do not have the copyright pre-filing registration requirement at issue before us, so we do not pass upon the continuing validity of the panel decision in *M.G.B. Homes.* Suffice it to say that to the extent, *if any, M.G.B. Homes* supports the dissent's position, it is to that extent inconsistent with the Supreme Court's subsequent decision in *Freeport-McMoRan,* which we have already discussed, and we are guided by that Supreme Court decision.

In closing out our discussion of this issue, we express our appreciation to the dissenting opinion for its candor in acknowledging that by bringing this type of claim while incarcerated these six plaintiffs have clearly violated section 1997e(e). As the dissenting opinion acknowledges: "The question is not, what is the meaning of the word 'brought.' It is, instead, what happens when a plaintiff violates section 1997e(e) by bringing a federal civil action while in custody, but is later released, and seeks to supplement his pending complaint to reflect the fact of his release? In other words, *what is the remedy* for plaintiff's violation of the statute?" Dissenting Op. at 2753-54 (emphasis in original). The answer, according to the dissenting opinion, is that there is no remedy for such a

violation of the statute. Instead, the violation is to be treated as though it never occurred and the plaintiff is not to be sanctioned in any way for the violation—not even by being forced to re-file the claim after release. We disagree, because we do not think the way to enforce congressional enactments is by removing any burden, inconvenience, or expense from those who violate them.

D. Application to Constitutional Claims

We turn now to one final matter. Under the guise of seeking to avoid what they describe as "serious constitutional questions," the plaintiffs ask us, in effect, to rewrite section 1997e(e) by construing it not to apply to constitutional claims. The panel at least implicitly held that section 1997e(e) does apply to constitutional claims, *see Harris,* 190 F.3d at 1286, and for three reasons we agree. First, the "avoidance" canon of construction plaintiffs rely upon applies where there is ambiguous statutory language, *see Southlake Property Associates, Ltd. v. City of Morrow, Georgia,* 112 F.3d 1114, 1119 (11th Cir.1997), and here there is none. Section 1997e(e) unequivocally states that "*No* Federal Civil Action may be brought ...," 42 U.S.C. § 1997e(e) (emphasis added), and "no" means no. The clear and broad statutory language does not permit us to except any type of claims, including constitutional claims. *See Cassidy v. Indiana Dep't of Corrections,* 199 F.3d 374, 376 (7th Cir.2000) (rejecting the contention that section 1997e(e) does not apply to constitutional claims, and after quoting the first four words of the provision, explaining that "[i]n light of this plain language, we will not carve out exceptions for which Congress did not provide."). Courts should not employ the canon of construction that ambiguous statutory language is to be construed to avoid constitutional questions as a pretext for rewriting clear statutory language. *See Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 841, 106 S.Ct. 3245, 3251, 92 L.Ed.2d 675 (1986) ("It is

equally true, however, that this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication," and a court "must not and will not carry this [canon] to the point of perverting the purpose of a statute or judicially rewriting it.") (internal marks and citation omitted).

Second, as we have already discussed, the legislative history of the PLRA clearly shows that its purpose is to substantially reduce the number of prisoner lawsuits. *See* supra, at 2740-41. That purpose could never be attained if constitutional claims were not covered by the restrictive provisions, because the overwhelming majority of prison lawsuits raise one or more constitutional claims. Construing section 1997e(e) to be inapplicable to constitutional claims would render it virtually meaningless.

Third, the constitutional issues plaintiffs ask us to rewrite the statute to avoid were decided against them by the panel opinion in this case, *see Harris,* 190 F.3d at 1287-90, and we have reinstated that part of the opinion as the law of this circuit. *See also Davis v. District of Columbia,* 158 F.3d 1342, 1345-48 (D.C.Cir.1998) (rejecting constitutional challenges to section 1997e(e)).

III. CONCLUSION

When plaintiffs Chadwick, Cook, Dailey, Harris, Hooks, and Nation brought this "federal civil action," they were each a "prisoner confined in a jail, prison, or other correctional facility." For that reason, and notwithstanding the fact that each of them was released from confinement before the district court entered judgment against them, 42 U.S.C. § 1997e(e) applies with full force and effect to them. Accordingly, the judgment of the district court is affirmed, except to the extent that it dismissed with prejudice under section 1997e(e) the claims of

those six plaintiffs for monetary relief. To that extent only, the judgment is vacated and remanded with directions that the monetary relief claims of those six plaintiffs that are barred solely because of section 1997e(e) are to be dismissed without prejudice to their being re-filed at a time when the plaintiffs are not confined.

AFFIRMED in part and VACATED and REMANDED in part.[13]

ANDERSON, Chief Judge, concurring specially:

I concur in the result, and in much of the reasoning of the majority. I agree with the majority that the statutory language evinces a congressional purpose to discourage, indeed to bar, a prisoner from bringing a suit for mental or emotional injury suffered while in custody without a prior showing of physical injury. I do not believe that it is contrary to the statutory language to routinely dismiss such suits, even if the prisoner has been released after the filing of the suit. Indeed, I believe dismissal would be the appropriate action in most such circumstances; and that dismissal would best serve the congressional language and purpose.

However, I agree with the dissent that Fed.R.Civ.P. 15(d) would provide some discretion in a district judge to entertain a supplemental pleading setting forth the fact of a prisoner's release, and to avoid dismissing a case under some of the more unusual circumstances described by the dissent. In my judgment, a district court should exercise such discretion only rarely (for example, when a prisoner had a colorable claim of physical injury which has been tried to a jury and when a dismissal would involve a manifest waste of judicial resources).

---

[13] We decide only the issues that we have expressly addressed and imply no view about any other issue.

Because it is clear to me that the instant case is not one in which the district judge would exercise discretion to avoid dismissal, a remand would be futile. Accordingly, I concur in the judgment affirming the district court.

TJOFLAT, Circuit Judge, concurring in part and dissenting in part in which BIRCH, BARKETT and WILSON, Circuit Judges, join:

The majority states that Congress enacted 42 U.S.C. § 1997e(e) (passed as part of the Prison Litigation Reform Act of 1995, Pub.L. No. 104-134, 110 Stat. 1321 (1996) (codified in scattered sections of 42 U.S.C. & 28 U.S.C.) (the "PLRA")) "[i]n an effort to stem the flood of prisoner lawsuits in federal court." *Ante* at 2734. The majority opinion, however, will do just the opposite. For this reason, and because the majority's interpretation of section 1997e(e) cannot be reconciled with either the text of the statutory provision, or the congressional purpose, I dissent from the court's holding that the district court properly dismissed plaintiffs' complaint under section 1997e(e) of the PLRA,[1] even though that section no longer applies to plaintiffs because they are no longer prisoners within the meaning of the Act.[2]

Today the court holds that a district court lacks

---

[1]The only issues remaining in this case involve plaintiffs Danny Chadwick, Frederick Harris, Lenois Cook, Willie Hooks, Farrell Nation, and William Dailey. All references to "plaintiffs" herein refer to these six plaintiffs only.

[2]I concur in the majority opinion insofar as it reinstates those parts of the panel opinion that dispose of the claims of plaintiffs Samuel Locklear, Alan Kilgore, Leroy Langes, Dayton Brinkley, and James Wade. *See Harris v. Garner*, 190 F.3d 1279, 1281-84, 1285-90, *vacated and reh'g en banc granted*, 197 F.3d 1059 (11th Cir.1999).

discretion to allow a former prisoner to supplement his complaint to notice the fact of his release from incarceration. This means that whenever a prisoner files an action for mental or emotional injury, the district court has an obligation to dismiss the case no matter what stage the litigation has reached, and regardless of whether section 1997e(e) has ceased to apply in his case. Because the district court must dismiss a former prisoner's case without prejudice, the court will have to entertain the case a second time after essentially the same action is re-filed. Today's decision requires this result even if the first suit reached the summary judgment stage or went to trial. Two full-blown court proceedings may now be required to dispose of one case; this hardly "stem[s] the flood of prisoner lawsuits in federal court."

In Part I, below, I set out the facts of the instant case. In Part II, I explain that because plaintiffs are allowed to supplement their complaint under Rule 15(d) of the Federal Rules of Civil Procedure to notice the fact of their release from incarceration, they should be able to continue their lawsuit against employees of the Georgia Department of Corrections (the "GDC"). Finally, in Part III, I discuss the awful burden that the majority has placed on the judiciary by requiring district courts to dismiss a former prisoner's claims for mental or emotional injury under section 1997e(e), and then entertain his claims anew when the plaintiff re-files what is essentially the same lawsuit.

I.

Eleven plaintiffs brought this civil rights suit for damages and injunctive relief in the United States District Court for the Middle District of Georgia against employees of

the GDC;[3] six of these plaintiffs are presently before the court. Plaintiffs alleged violations of their Fourth, Eighth, and Fourteenth Amendment rights as a result of actions allegedly taken by the defendants during a "shakedown" at Georgia's Dooly State Prison facility.[4] The district court referred the case to a magistrate judge in accordance with 28 U.S.C. § 636 (1994).

On February 4, 1998, before the magistrate judge had issued his report and recommendation to the district court, plaintiffs moved the court for leave to withdraw their claims for injunctive relief because they had been released from the custody of the GDC, and their release had mooted such claims. *See Tucker v. Phyfer,* 819 F.2d 1030, 1033 (11th Cir.1987). In his report, the magistrate judge recognized that "[p]resently pending before" him was "the plaintiffs' motion to withdraw the injunctive claims of six of their number who have been released." He implicitly granted plaintiffs' motion to withdraw their claims for injunctive relief, and despite the fact that plaintiffs were no longer incarcerated, he also recommended that their claims for compensatory and

---

[3]The complaint was filed against "Wayne Garner, Commissioner of the Georgia Department of Corrections; A.G. Thomas, Director of Facilities Division of the Georgia Department of Corrections; Duke Blackburn, Executive Assistant, Special Operations of the Georgia Department of Corrections; and Twenty-Two Unnamed Tactical Squad Officers of the Georgia Department of Corrections, in their individual and official capacities."

[4]In this context, a prison "shakedown" is a systematic search of a correctional institution during which prison officials search for illegal drugs and other contraband by means of body cavity searches, searches of inmates' living quarters, and searches of other areas of the institution. For details regarding the alleged "shakedown," *see Harris,* 190 F.3d at 1282-83.

punitive damages be dismissed under 42 U.S.C. § 1997e(e).[5] Section 1997e(e) provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." The magistrate judge reasoned that " § 1997e(e) is applicable to the claims of prisoners who have been released," citing *Zehner v. Trigg,* 952 F.Supp. 1318, 1324 (S.D.Ind.1997), and *Kerr v. Puckett,* 967 F.Supp. 354, 361-62 (E.D.Wis.1997), both of which were overturned by the Seventh Circuit in *Kerr v. Puckett,* 138 F.3d 321, 323 (7th Cir.1998) (holding that section 1997e(e) does not apply to former prisoners who are no longer incarcerated). It is thus abundantly clear that the magistrate judge treated plaintiffs' complaint as supplemented under Rule 15(d) to reflect the fact that plaintiffs had been released from the custody of the GDC.[6] It is also clear that he recommended dismissal of plaintiffs' claims for compensatory and punitive damages despite the fact that

---

[5] 42 U.S.C. § 1997e(e) only precludes prisoners from bringing actions for compensatory and punitive damages. It does not apply to actions for declaratory or injunctive relief. *See Harris,* 190 F.3d at 1287-89.

[6] The panel stated that the magistrate judge and district court treated the complaint as "amended" for purposes of noticing plaintiffs' release from custody. *Harris,* 190 F.3d at 1284. Technically, this was an error since the magistrate judge and district court actually treated the complaint as "supplemented" under Rule 15(d); plaintiffs release from custody was a "transaction[ ] or occurrence[ ] or event[ ] which ... happened since the date of the [original] pleading," Fed.R.Civ.P. 15(d), and not an event which happened prior to the date of the original complaint. Only prior events are properly treated as amendments under Rule 15(a). The error is substantively unimportant, however. *See Glatt v. Chicago Park Dist.,* 87 F.3d 190, 194 (7th Cir.1996) (holding that the standard applied to cases in which parties seek to supplement their pleadings under Rule 15(d) is the same as the standard applied to cases in which plaintiffs seek to amend their pleadings under Rule 15(a)).

plaintiffs were no longer incarcerated. His recommendation, in this regard, was based on an error in interpreting section 1997e(e) to apply to the claims of former prisoners who are no longer incarcerated. The district court adopted the magistrate judge's recommendation without relevant modification, and dismissed plaintiffs claims with prejudice.[7]

---

[7] I am thus uncertain why the majority is not "entirely convinced that the complaint was actually amended." *Ante* at 2743. The majority appears suspicious of the panel's conclusion that "the magistrate judge treated the complaint as amended" to reflect the fact of plaintiffs' release from the GDC, *Harris,* 190 F.3d at 1283, because

> [n]o motion to amend the complaint was filed, and neither the magistrate judge nor the district court said the complaint had been amended. The plaintiffs did file a motion to withdraw their request for injunctive relief, which simply acknowledged that there was no longer any need for an injunction in view of their release. But the court did not formally rule on that motion. Instead, the magistrate judge (whose recommendations were adopted by the district court without relevant change) concluded: "These plaintiffs cannot obtain monetary relief because they alleged only mental or emotional injuries and their injunctive claims are moot since they have been released from prison."

Ante at 2743 n. 10. The majority recognizes that plaintiffs did file a motion alerting the court that they had been released from custody, and seeking to withdraw their claims for injunctive relief because their release had mooted such claims. Therefore, it is simply not true that "[n]o motion to [supplement] the complaint was filed." *Id.* The motion was not titled "MOTION TO SUPPLEMENT PLAINTIFFS' COMPLAINT TO REFLECT THE FACT OF PLAINTIFFS' RELEASE FROM CUSTODY, AND TO ALERT THE DISTRICT COURT THAT PLAINTIFFS ARE NO LONGER SUBJECT TO 42 U.S.C. § 1997e(e);" plaintiffs' motion concerned, instead, their claims for injunctive relief (not covered by section 1997e(e)). But it is clear that the magistrate judge treated the complaint as supplemented for the purpose of determining whether section 1997e(e) applied to plaintiffs' claims for compensatory and punitive damages, even though plaintiffs were no longer incarcerated; the record reflects that the magistrate judge (1) recognized in his report and recommendation to the district court that plaintiffs had been released from the custody of the GDC,

and (2) recommended dismissal of plaintiffs' claims for compensatory and punitive damages based on the erroneous conclusion that " § 1997e(e) is applicable to the claims of prisoners who have been released." The district court, in its order adopting the magistrate judge's recommendations, likewise treated plaintiffs' complaint as supplemented to reflect the fact of plaintiffs' release, but nevertheless dismissed plaintiffs' complaint under an erroneous reading of section 1997e(e).

There is no doubt that the magistrate judge and the district court had the power, even the obligation, to treat plaintiffs' complaint as supplemented to reflect the fact of their release. *See Foman v. Davis,* 371 U.S. 178, 181, 83 S.Ct. 227, 229-30, 9 L.Ed.2d 222 (1962) (courts have an obligation to read the parties' pleadings with the intent of the parties in mind); *cf.* Fed.R.Civ.P. 15(b) (allowing parties to amend their pleadings to conform to the evidence, either at trial or even after judgment, and stating that "[i]f evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits"). The majority's assertion that "the requirements of Rule 15(d) were not met," *ante* at 2743-44, is curious. In *Mathews v. Diaz,* 426 U.S 67, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976), the Supreme Court made clear that Rule 15(d)'s "requirements" should not be read to impede a decision on the merits because of a technical error or omission. In *Mathews,* as in the instant case, "[t]here was no [formal] motion to supplement the pleadings." *Ante* at 2744 n. 11. Despite this omission, the Supreme Court held that

> "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. § 1653. Although the defect in [plaintiff's] allegations must be cured by supplemental pleading, instead of amended pleading, the statutory purpose of avoiding needless sacrifice to defective pleading applies equally to this case.... *Despite [plaintiff's] failure to supplement the complaint, the District Court was aware that he had filed his application;* since the Secretary stipulated that the application had been filed, the defect in the pleadings surely did not prejudice him.

Mathews, 426 U.S. at 75 n. 9, 96 S.Ct. at 1889 n. 9 (citations omitted) (emphasis added). As in *Mathews,* the district court in the instant case was

II.

Following, I discuss three elements necessary to resolve the question of whether to allow plaintiffs to supplement their complaint to reflect the fact of their release, and thus to allow them to continue their civil suit against employees of the GDC. These are: (1) under 42 U.S.C. § 1997e(e), prisoners *cannot* bring federal civil actions for "mental or emotional injury suffered while in custody without a prior showing of physical injury" while they are confined; (2) after they are released from confinement, former prisoners *can* bring federal civil actions for "mental or emotional injury suffered while in custody without a prior showing of physical injury;" and (3) Rule 15(d) of the Federal Rules of Civil Procedure allows litigants to supplement their pleadings to "set[ ] forth transactions or occurrences or events which have happened since the date of the [original] pleading ... even though the original pleading is defective in its statement of a claim for relief or defense." After discussing

---

obviously aware of the critical fact (that plaintiffs had been released from incarceration), since plaintiffs filed a motion alerting the court that they had been released from custody, and seeking to withdraw their claims for injunctive relief. Also, there is no reasonable argument that the court's allowance of a motion to supplement the complaint in any way prejudiced the defendants, since defendants cited *Zehner v. Trigg*, 952 F.Supp. 1318 (S.D.Ind.1997) (holding that section 1997e(e) applies to the claims of prisoners who have been released from custody), in their motion to dismiss plaintiffs' complaint. Defendants, therefore, anticipated that plaintiffs' release would require them to convince the court that section 1997e(e) should bar plaintiffs' claims for mental or emotional injury, even though plaintiffs were no longer incarcerated. Treating Rule 15(d) as if it has certain "requirements" that can never be waived by the district court, even if waiver would facilitate a proper decision on the merits, does not comport with the concept of notice pleading, and the purpose behind the Federal Rules. *See infra* at 2755-61 (discussing the 1963 amendment to Rule 15(d) and the philosophy of the Federal Rules of Civil Procedure).

these elements, I then ask whether Congress has indicated, either in the statutory text or in the legislative history of the PLRA, its intent to abrogate Rule 15(d) in applying section 1997e(e), so that prisoners should be precluded from supplementing their complaints to reflect the fact of their release.

A.

42 U.S.C. § 1997e(e) precludes prisoners from bringing federal civil actions "for mental or emotional injury suffered while in custody without a prior showing of physical injury" while they are "confined in a jail, prison, or other correctional facility." For reasons not entirely clear to me, the majority spends most of its opinion focusing on this element, canvassing every part of the PLRA to come up with the totally unremarkable conclusion that when section 1997e(e) says "[n]o Federal civil action may be brought," it means that no prisoner can "commence or start a lawsuit," *ante* at 2735, for "mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e).

I have no idea why the majority goes to such lengths to demonstrate this point, or what other definition of the word "brought" might be considered plausible. The majority appears to believe that the panel mistakenly interpreted "brought" to mean "maintain[ed]" or "continue[d]," *ante* at 2735, and that this was the source of its supposed error in holding that plaintiffs should be allowed supplement their complaint to reflect the fact of their release. But following the majority's reasoning, it would make no difference if the statute prohibited the "commencing" of a federal civil action, or the "maintenance" of a federal civil action while in custody. According to the majority, a violation of the statute requires the district court to dismiss the plaintiff's suit no matter what events transpire subsequent to the violation. If this is the case, then the

district court would have to dismiss a suit, even after the prisoner's release, that was "maintained" by a prisoner while in custody, just as the court would have to dismiss a suit that was "commenced" while in custody. I thus fail to understand the majority's distinction, but in any case, it is of no moment. It is obvious that the word "brought" means "commence[d] or start[ed]," *ante* at 2735, and so I have no quibble with this aspect of the majority opinion.[8] The

---

[8] In its discussion of the statutory language, the majority suggests that one line of cases, interpreting the full payment provision of the PLRA, does more than establish that "brought" means "commenced." 28 U.S.C. § 1915(b)(1) (1994 & Supp. II 1996) provides that

> if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of—
>
> (A) the average monthly deposits to the prisoner's account; or
>
> (B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

In *Gay v. Texas Dept. of Corrections State Jail Div.*, 117 F.3d 240 (5th Cir.1997), and in *Robbins v. Switzer*, 104 F.3d 895 (7th Cir.1997), the Fifth and Seventh Circuits held that this part of the PLRA requires former prisoners to pay amounts due under the statute through the time of their release in order to continue prosecuting claims filed while in custody. This interpretation of section 1915(b)(1) makes sense because, as the D.C. Circuit has observed, if a prisoner has not complied with the filing fee provisions of the statute, he still has "past due, unmet obligations" even if he is later released. *In re Smith*, 114 F.3d 1247, 1251-52 (D.C.Cir.1997). All of the circuits interpreting section 1915(b)(1) recognize that the statute ceases to apply when a prisoner is released; it has not been applied to require prisoners to pay fees that would accrue *after* the prisoner is released. As the D.C. Circuit held in *Smith*,

question is not what is the meaning of the word "brought." It is, instead, what happens when a plaintiff violates section 1997e(e)

> [plaintiff's] liability for the PLRA fees that should have been paid prior to his release from prison under § 1915(b) [should] be calculated, and [plaintiff] must pay that amount.... However, [plaintiff] may rely on in forma pauperis status for the balance of the filing fee ..., as his current poverty does not pose a bar to relief, except with respect to past due amounts under the PLRA that were assessed based upon a calculation that Smith had means to pay them when due.

Id. at 1252 (citations omitted); *see also Robbins,* 104 F.3d at 898 ("[I]f according to the trust account statements [plaintiff] could (and therefore should) have paid $50 at the time he filed his appeals, and the trust accounts received no income before his release, then he must pay $50 now and may apply for in forma pauperis status on the balance. How much [plaintiff] actually must prepay depends on the application of the formula in § 1915(b) to the balances and income of his trust account through the day of his release."). It is reasonable to require former prisoners to meet past due obligations that constitute a condition precedent to their ability to bring suit, even after they have been released from custody. The full payment provision of section 1915(b)(1) is not being applied to them as *former prisoners,* but as persons who have incurred a debt that has not yet been satisfied. In the instant case, the majority uses section 1997e(e) to bar plaintiffs claims, even though the statute no longer applies in their cases. The majority's analogy would work if Congress had provided for a civil fine for violations of section 1997e(e) (e.g., a fine of $10 for each pre-release filing); in that circumstance, even after his release a former prisoner would still owe the fine for filing while incarcerated, because the fine owed would constitute a past due amount. But it seems odd to suggest, as the majority does, that plaintiffs in the instant case are owed a "past due dismissal" because they filed while incarcerated. *Cf. Murphy v. Magnusson,* No. Civ. 98-439-P-C., (D.Me. July 27, 1999) (refusing to dismiss plaintiff's claim filed while incarcerated even though plaintiff had not complied with the administrative exhaustion requirement of 42 U.S.C. § 1997e(a), because plaintiff had since been released from custody; "where Plaintiff could immediately refile his claims without exhausting administrative remedies ... it would not serve judicial efficiency to dismiss Plaintiff's Complaint. Because circumstances have changed such that Plaintiff is no longer required ... to exhaust administrative procedures, the Court will not now require Plaintiff to exhaust available administrative remedies.").

by bringing a federal civil action while in custody, but is later released, and seeks to supplement his pending complaint to reflect the fact of his release? In other words, *what is the remedy* for plaintiff's violation of the statute?

The second element is that 42 U.S.C. § 1997e(e) does not apply to former prisoners who are no longer incarcerated. As the panel explained,

> 42 U.S.C. § 1997e(e) provides: "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." Section 1997e(h) defines a "prisoner" as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 42 U.S.C. § 1997e(h) (Supp. II 1996). According to the plain language of the statute, section 1997e(e) does not apply to former prisoners, or those who have been released from a correctional facility, because such persons are clearly not "confined in a jail, prison, or other correctional facility," or "incarcerated or detained in any facility." The statute could not be more plain: it applies to those who (a) seek a civil remedy for mental or emotional injury suffered while in custody, and (b) seek such a remedy while they are incarcerated. As the Seventh Circuit has noted in analyzing section 1997e(e), "[t]he statutory language does not leave wriggle room." *Kerr v. Puckett,* 138 F.3d 321, 323 (7th Cir.1998). It does not apply to persons who have never been prisoners; nor does it apply to former prisoners who seek civil relief for injuries suffered while they were prisoners.

Defendants argue that Congress' purpose in enacting the PLRA was to curtail frivolous prisoner litigation, and that reading the statute to bar certain claims by current but not former prisoners is not faithful to congressional intent because, under our interpretation today, some claims "for mental or emotional injury suffered while in custody" can be brought "without a prior showing of physical injury." Further, defendants see little sense in discriminating between prisoners who bring suit while they are incarcerated, and former prisoners who seek relief on the same day they are released.

Absent mistake or absurdity, we implement the statutory language as enacted. *Salinas v. United States,* 522 U.S. 52, 57-58, 118 S.Ct. 469, 473-74, 139 L.Ed.2d 352 (1997). Here, the language of section 1997e(e) could not be clearer. And contrary to defendants' congressional intent argument, Congress manifestly wanted to draw a bright line distinction between those who *are* prisoners, and those who are *not* prisoners. *See* 141 Cong. Rec. S7524-26 (daily ed. May 25, 1995) (statements by Senators Dole and Kyl) (prisoners have a unique incentive to file frivolous lawsuits because litigation "has become a recreational activity for long-term residents of our prisons," because prisoners "have little to lose and everything to gain," and because filing frivolous complaints is "a means of gaining a short sabbatical in the nearest Federal courthouse") (citations and internal quotation marks omitted). The distinction makes a good deal of sense because the "[o]pportunity costs of litigation rise following release, diminishing the need for special precautions against weak suits." *Kerr,* 138 F.3d at 323. In light of the overwhelming clarity of the statutory text, we join the Seventh Circuit in holding that section 1997e(e) applies

> only to prisoners who are incarcerated at the time they seek relief, and not to former prisoners who seek damages for injuries suffered while they were incarcerated. *See id.; see also, Greig v. Goord,* 169 F.3d 165, 167 (2d Cir.1999) (interpreting "prisoner" as used in section 1997e(a), dealing with administrative exhaustion, as not applying to former prisoners no longer incarcerated); *Doe v. Washington County,* 150 F.3d 920, 924 (8th Cir.1998) (interpreting "prisoner" as used in section 1997e(d), dealing with attorneys' fees, as not applying to former prisoners).

Harris, 190 F.3d at 1284-85. The majority concurs in this holding today. *See ante* at 2743 ("Because section 1997e(e) applies only to claims filed while an inmate is confined, it does not prevent a former prisoner from filing after release a monetary damages claim for mental or emotional injury suffered while confined, without a prior showing of physical injury.").

The third and final element is that under Rule 15(d) of the Federal Rules of Civil Procedure, litigants are allowed to supplement their pleadings to "set[ ] forth transactions or occurrences or events which have happened since the date of the [original] pleading ... even though the original pleading is defective in its statement of a claim for relief or defense." Prior to 1963, the text of Rule 15(d) read, in part, as follows:

> Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.

Minnesota Mining and Mfg. Co. v. Superior Insulating Tape Co., 284 F.2d 478, 481 (8th Cir.1960) (quoting Fed.R.Civ.P.

15(d)) (emphasis omitted). Because of this wording, "several federal courts held that a supplemental complaint could not be used to cure a complaint that failed to state a claim for relief, even though subsequent events had made plaintiff's right to relief apparent and the later pleading effectively cured the deficiencies in the initial effort." 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1505 (2d ed.1990). The theory these courts used was that "plaintiff's right to relief had to be predicated on facts in existence at the time the complaint was filed." *Id.; see, e.g., La Salle Nat'l. Bank v. 222 East Chestnut St. Corp.*, 267 F.2d 247, 252 (7th Cir.1959); *Bonner v. Elizabeth Arden, Inc.*, 177 F.2d 703, 705 (2d Cir.1949). *But see Camilla Cotton Oil Co. v. Spencer Kellogg and Sons, Inc.*, 257 F.2d 162, 165, 167-68 (5th Cir.1958) (allowing plaintiff, under pre-1963 Rule 15(d), to supplement claim for attorney's fees with a pleading indicating that the statutory notice required for plaintiff to get attorney's fees had been satisfied subsequent to the filing of the claim, even though the claim was "imperfect until proper notice was given");[9] *United States v. Reiten*, 313 F.2d 673, 674-75 (9th Cir.1963) (allowing plaintiff, under pre-1963 Rule 15(d), to supplement complaint with notice to the court that the ninety days required by federal statute before plaintiff had a "right to sue" had expired since the filing of the complaint because "[t]o require appellant to commence a new and separate action in these circumstances would have been to insist upon an empty formalism"). In response to what was perceived as the useless formality of forcing a district court to dismiss a suit without prejudice, so that the plaintiff could then re-file the suit based on subsequent events that had made clear his right to relief,

---

[9] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Rule 15(d) was amended in 1963 to include the following language: "Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense." The advisory committee's note to the 1963 amendment emphasizes that the amended Rule is intended to allow both courts and litigants flexibility in addressing the substance of a plaintiff's complaint, rather than require parties to engage in an empty ritual of mindless form:

> Rule 15(d) is intended to give the court broad discretion in allowing a supplemental pleading. However, some cases, opposed by other cases and criticized by the commentators, have taken the rigid and formalistic view that where the original complaint fails to state a claim upon which relief can be granted, leave to serve a supplemental complaint must be denied.... Thus plaintiffs have sometimes been needlessly remitted to the difficulties of commencing a new action even though events occurring after the commencement of the original action have made clear the right to relief.
>
> Under the amendment the court has discretion to permit a supplemental pleading despite the fact that the original pleading is defective.

Fed.R.Civ.P. 15(d) advisory committee's note (1963). Thus, it is now clear that plaintiffs are allowed to supplement their pleadings, even if their claim for relief is entirely dependent on events occurring subsequent to the filing of their original complaints.

It is also clear that plaintiffs can cure *jurisdictional* defects in their original complaints by means of a supplemental pleading. In *Mathews v. Diaz,* 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976), plaintiff filed a complaint under the Social Security Act, challenging the constitutionality of a provision of

the Act which conditioned an alien's eligibility for benefits on continuous residence in the United States for a five-year period and admission for permanent residence. Plaintiff filed his complaint on October 24, 1972; but it was not until two days later, on October 26, that plaintiff actually filed an application for enrollment in the Social Security benefits program, and then brought the fact of his application to the attention of the district court (without formally supplementing his complaint). The statutory provision giving plaintiff a right of action, provided that

> [a]ny individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action *commenced* within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow.

42 U.S.C. § 405(g) (1994) (emphasis added). Because plaintiff had filed his action before he had applied for benefits, the Supreme Court had to decide "whether the District Court had jurisdiction over [plaintiff's] claim." *Mathews,* 426 U.S. at 75, 96 S.Ct. at 1889. The Court responded as follows:

> We have little difficulty with [plaintiff's] failure to file an application with the Secretary until after he was joined in the action. Although 42 U.S.C. § 405(g) establishes filing of an application as a nonwaivable condition of jurisdiction ..., [plaintiff] satisfied this condition while the case was pending in the District Court. A supplemental complaint in the District Court would have eliminated this jurisdictional issue; since the record discloses, both by affidavit and stipulation, that the jurisdictional condition was satisfied, it is not too late, even now, to supplement the complaint to

> allege this fact. Under these circumstances, we treat the pleadings as properly supplemented by the Secretary's stipulation that [plaintiff] had filed an application.

Id. (citations omitted). The Court further elaborated,

> "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. § 1653. Although the defect in [plaintiff's] allegations must be cured by supplemental pleading, instead of amended pleading, the statutory purpose of avoiding needless sacrifice to defective pleading applies equally to this case.... Despite [plaintiff's] failure to supplement the complaint, the District Court was aware that he had filed his application; since the Secretary stipulated that the application had been filed, the defect in the pleadings surely did not prejudice him.

Id. at 75 n. 9, 96 S.Ct. at 1889 n. 9 (citations omitted).

Until today, this court has consistently followed the Supreme Court's direction that a supplemental pleading should be liberally allowed if it will cure a defect in the complaint. In *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486 (11th Cir.1990), plaintiff sued for infringement under the Copyright Act, which provides, in pertinent part,

> *no action* for infringement of the copyright in any work *shall be instituted* until registration of the copyright claim has been made in accordance with this title.

17 U.S.C. § 411(a) (1994) (emphasis added). Plaintiff filed a complaint for infringement before applying for copyright registration, but later moved the court to supplement its pleading with notice that it had since filed the required application with the Copyright Office. The district court

allowed the supplement and we affirmed, even though "[t]he registration requirement is a jurisdictional prerequisite to an infringement suit." *Id.* at 1488. We stated,

> [the district court] was, at most, technically without jurisdiction to entertain [plaintiff's] motion to amend its complaint. However, it is entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities.
>
> ....
>
> The amended complaint submitted by [plaintiff] contained all the required allegations. On its face it asserted that the trial court had jurisdiction over the new infringement action. Except for the technical distinction between filing a new complaint and filing an amended complaint, the case would have been properly filed.

Id. at 1489 (internal citation and quotation marks omitted);[10]

---

[10]The majority makes the remarkable assertion that the approach taken in *M.G.B. Homes* is "problematic," and suggests that the "continuing validity" of the case may be in doubt in light of the Supreme Court's decision in *Freeport-McMoRan, Inc. v. KN Energy, Inc.*, 498 U.S. 426, 111 S.Ct. 858, 112 L.Ed.2d 951 (1991). *Ante* at 2747. *Freeport-McMoRan* had nothing to do with a federal court's ability to allow a plaintiff to supplement his complaint to cure a jurisdictional defect in the original pleading when, as in *M.G.B. Homes* and in the instant case, the court's jurisdiction is premised on the existence of a federal question. In that case, the Supreme Court merely reaffirmed the longstanding rule that "diversity of citizenship is assessed at the time the action is filed.... [I]f jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events." *Id.* at 428, 111 S.Ct. at 860. As I explain *infra* at 2759-60 n. 11, the issue of *diversity* jurisdiction implicates unique considerations that do not apply in cases in which the federal court's jurisdiction is premised on the

see also Lussier v. Dugger, 904 F.2d 661, 669-70 (11th Cir.1990) (holding that plaintiff should be allowed to supplement his complaint with the fact that since filing against a state agency under the federal Rehabilitation Act, the Act had been amended to abrogate the state's Eleventh Amendment immunity, and thus the district court had jurisdiction over the case for any violations that took place subsequent to the date of the amendment's enactment); *Rowe v. United States Fidelity and Guar. Co.,* 421 F.2d 937, 940, 944 (4th Cir.1970) (holding that district court abused its discretion in denying plaintiffs, as creditors of an insured, leave to supplement their complaint, originally filed before the insured had assigned his rights in the insurance to the creditors, with notice that the insured had since assigned his rights; this was so even though the "action [was] judicially cognizable at all ... only through [the] assignment"); *Roth Greeting Cards v. United Card Co.,* 429 F.2d 1106, 1108-09 (9th Cir.1970) (holding that it was error for the district court to dismiss plaintiff's complaint for lack of jurisdiction under the Copyright Act, which provided that no infringement action "shall be maintained" until the work is registered, when the plaintiff registered the work subsequent to the filing of its complaint, and a pretrial conference order evidenced that the court treated the complaint as supplemented); *Security Ins. Co. v. United States,* 338 F.2d 444, 449 (9th Cir.1964) (holding that plaintiff should be allowed to supplement his complaint under the Miller Act, originally filed before the statutory period of ninety days provided for in 40 U.S.C. § 270b(a) had elapsed, with notice that ninety days had since elapsed, because the federal rules encourage "decision[s] on the merits"); *Katzman v. Sessions,* 156 F.R.D. 35, 39 (E.D.N.Y.1994) (holding that plaintiff should be allowed to supplement his complaint with

---

existence of a federal question. It seems odd for the majority to assert casually that the "continuing validity" of *M.G.B. Homes* is in doubt, when the only evidence the majority cites for that proposition is a Supreme Court case that is clearly inapposite.

notice that he had exhausted the administrative remedies required for him to file suit under the Freedom of Information Act, 5 U.S.C. § 552 (1994); the fact that he did not exhaust until after filing did not require dismissal); *Montgomery Environmental Coalition v. Fri,* 366 F.Supp. 261, 265-66 (D.D.C.1973) (holding that plaintiffs should be allowed to supplement their complaint with notice that the statutory period of sixty days required under the Water Pollution Control Act had elapsed since they filed their complaint; this was so even though 33 U.S.C. § 1365(b) provided that "[n]o action may be *commenced* ... prior to sixty days after the plaintiff has given notice of the alleged violation") (emphasis added); *Amar v. Garnier Enters., Inc.,* 41 F.R.D. 211, 214-15 (C.D.Cal.1966) (holding that plaintiff should be allowed to supplement his complaint with notice that since filing shareholder's derivative action under California law, he had become a registered shareholder; this was so even though California Corporations Code provided that "[n]o action may be *instituted* or maintained in right of any ... corporation ... by the holder ... of shares ... unless ... the plaintiff alleges in the complaint that he was a ... registered shareholder ... at the time of the transaction or any part thereof of which he complains") (emphasis added); *Lynam v. Livingston,* 257 F.Supp. 520, 524-25 (D.Del.1966) (holding that plaintiff should be allowed to supplement her complaint filed as a shareholder's derivative action with notice that since filing, she had made a demand upon the board of directors to prosecute the claim; "the fact that plaintiff was without standing to sue when suit was begun cannot deprive her of the right to allege in a supplemental complaint that after suit was instituted she complied with all conditions required to give her a right to sue").[11]

---

[11]The majority analogizes the instant case to a situation in which the federal court has jurisdiction over a claim only because of the diversity of the parties' citizenship, and states, correctly, that "only citizenship of the original

parties ... matters for purposes of determining whether diversity jurisdiction exists." *Ante* at 2746. The unique considerations involved in addressing the existence of diversity jurisdiction, including concerns over parties acting strategically to defeat the statutory requirement, *see Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396, 2403, 57 L.Ed.2d 274 (1978), make necessary a "brightline policy of determining diversity as of the date of commencement of the action." 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3608 (2d ed.1984).

This is not a diversity case, but a case in which our jurisdiction is premised upon the existence of a federal question of no less than constitutional dimension; plaintiffs sued for violations of their Fourth, Eighth, and Fourteenth Amendment rights. Therefore, the diversity analogy is inapposite. The distinction between diversity and federal question jurisdiction, as it relates to the issue of whether parties can supplement their pleadings to cure a jurisdictional defect, is made clear by the myriad cases I cite that allow plaintiffs to supplement their original complaints with notice that, since filing, they have fulfilled the jurisdictional prerequisites to bring suit. These cases include Supreme Court precedent which explicitly states, in a case in which the Court's jurisdiction was premised on the existence of a federal question, that

> "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. § 1653. Although the defect in [plaintiff's] allegations must be cured by supplemental pleading, instead of amended pleading, the statutory purpose of avoiding needless sacrifice to defective pleading applies equally to this case.

Mathews, 426 U.S. at 75 n. 9, 96 S.Ct. at 1889 n. 9.

The majority is correct to note that just as this is "not a diversity case ..., neither is it a social security case or a copyright case." *Ante* at 2747. But that is not the point. The point is that this *is* a case in which our jurisdiction is premised on the existence of a *federal question*, and *not* a case in which we have jurisdiction only because the parties are diverse. Plaintiffs did not attempt to supplement their complaint to notice the fact of their acquired diversity; they sought to supplement their complaint to notice the fact that a *federal law* (section 1997e(e)) no longer applies in their case.

to enable parties to state a case or cure a jurisdictional defect is consistent with the underlying philosophy of the Federal Rules of Civil Procedure, that the Rules should "be construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed.R.Civ.P. 1. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Foman*, 371 U.S. at 181-82, 83 S.Ct. at 230. Thus, courts routinely grant leave to parties to amend their pleadings under Rule 15(a) to set forth transactions, occurrences, or events that could have been included in the original pleading, but were omitted for one reason or another. *See id.* ("In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought [to amend] should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."); *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir.1991) ("If our precedent leaves any doubt regarding the rule to be applied in this circuit, we now dispel that doubt by restating the rule. Where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice."); *Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1531 (11th Cir.1987) (holding that it was error for the district court to dismiss with prejudice without granting leave to amend because "[t]he district court's order contravened the well established policy in the federal courts favoring liberal pleading

requirements"); *Czeremcha v. International Ass'n of Machinists & Aerospace Workers,* 724 F.2d 1552, 1556 (11th Cir.1984) (holding that leave to file an amendment should be "granted liberally"). And under Rule 15(b), courts should allow amendments to conform the pleadings to the evidence both during trial, and even after judgment, as long as the opposing party cannot prove that he is thereby prejudiced:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits.

Fed.R.Civ.P. 15(b). All of this is in conformance with the "liberal system of notice pleading set up by the Federal Rules," requiring only a "short and plain statement of the claim showing that the pleader is entitled to relief." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 168, 113 S.Ct. 1160, 1163, 122 L.Ed.2d 517 (1993) (internal quotation marks omitted). The American legal system encourages the efficient resolution of claims on the merits, and not the avoidance of legal issues by means of tightfisted pleading requirements that constitute nothing more than traps

for the unwary.

With all three elements on the table, we can now answer the question of whether plaintiffs in the instant case can supplement their complaint to reflect the fact of their release, and thus continue their civil lawsuit against employees of the GDC; and the answer is obviously that they can. 42 U.S.C. § 1997e(e) provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." There is nothing in the plain language of the statute that suggests that Congress wanted federal courts to ignore Rule 15(d) in applying section 1997e(e). Given that the Federal Rules of Civil Procedure do, themselves, have statutory effect, *see United States v. St. Paul Mercury Ins. Co.*, 361 F.2d 838, 839 (5th Cir.1966), and given the enormous body of caselaw applying Rule 15(d) to cases in which plaintiffs must supplement their complaints in order to state a case or cure a jurisdictional defect, we would expect Congress to speak with unmistakable clarity if it wanted to override the Federal Rules of Civil Procedure in PLRA cases. *See Conroy v. Aniskoff*, 507 U.S. 511, 516 & n. 10, 113 S.Ct. 1562, 1566 & n. 10, 123 L.Ed.2d 229 (1993) (holding that there is a presumption that Congress is aware of the relevant case law); *Chisom v. Roemer*, 501 U.S. 380, 396, 111 S.Ct. 2354, 2364, 115 L.Ed.2d 348 (1991) (holding that if Congress had an intent to deviate from an established legal rule, "Congress would have made it explicit in the statute"). But there is no such unmistakable statement of abrogation; there is not even a hint in the statute that federal courts should abandon the usual rules of pleading, and disallow supplements which have always (at least since 1963) been freely allowed in the normal course to cure a defective complaint. *See Mathews*, 426 U.S. at 75 n. 9, 96 S.Ct. at 1889 n. 9 ("[T]he statutory purpose of avoiding needless sacrifice to defective pleading applies equally" in cases in which plaintiffs must supplement their complaints, as it does

to cases in which plaintiffs seek to amend."); *Quaratino v. Tiffany & Co.*, 71 F.3d 58, 66 (2d Cir.1995) ("[L]eave to file a supplemental pleading should be freely permitted."); *Music Deli & Groceries, Inc. v. IRS*, 781 F.Supp. 992, 997 (S.D.N.Y.1991) (same).

It does not appear that anyone in Congress even thought about the proposition that Rule 15(d) might not apply in PLRA cases. Despite the majority's "irresistible" impulse to dive into the legislative history, *ante* at 2739, there is not one word from anyone in Congress, or anyone commenting upon the ramifications of the Act, that indicates that Rule 15(d) might not apply in PLRA cases. *See Chisom*, 501 U.S. at 396 & n. 23, 111 S.Ct. at 2364 & n. 23 (holding that if Congress had an intent to deviate from an established legal rule when it enacted a statute, "at least some of the Members would have identified or mentioned [the issue] at some point in the ... legislative history.... Congress' silence in this regard can be likened to the dog that did not bark."). In light of today's decision, whenever Congress enacts a statute that qualifies the right of a person to "bring" or "commence" or "institute" an action under federal law, district courts in the Eleventh Circuit will have to conclude that Rule 15(d) is inapplicable, and that courts lack discretion to allow supplemental pleadings to enable a party to state a case or cure a jurisdictional defect. *See ante* at 2746-47 ("If an amendment or supplement to the pleadings is offered to show that the citizenship of one of the original parties has changed since the lawsuit was filed, that amendment or supplement should be denied as futile.").

Further, it is clear from the text of the statute that if Congress had wanted to override a Federal Rule of Civil Procedure, it certainly knew how to do so. In the same statutory section as 42 U.S.C. § 1997e(e), Congress provided in section 1997e(c)(1) that

> [t]he court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

42 U.S.C. § 1997e(c)(1). This statutory provision clearly overrides a defendant's normal obligation to file a Rule 12(b)(6) motion or other responsive pleading with the court in order to obtain a pre-answer dismissal, by allowing the court to dismiss *sua sponte* a plaintiff's action if it is "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." *Id.* We read each statutory provision with reference to the whole Act. *See Massachusetts v. Morash,* 490 U.S. 107, 115, 109 S.Ct. 1668, 1673, 104 L.Ed.2d 98 (1989). Where Congress has demonstrated its ability to provide for a particular remedy with specific statutory language, we should not read a statutory provision that contains no such specific language to allow for the particular remedy at issue. *See Dean v. American Sec. Ins. Co.,* 559 F.2d 1036, 1039 (5th Cir.1977); *see generally Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 38, 118 S.Ct. 956, 963, 140 L.Ed.2d 62 (1998); *West Virginia Univ. Hosps., Inc. v. Casey,* 499 U.S. 83, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991). Congress knew how to abrogate the Federal Rules when it wanted to do so, in section 1997e(c)(1). Because Congress enacted no abrogating language in section 1997e(e), it could not have meant that courts should ignore Rule 15(d) of the Federal Rules of Civil Procedure in applying that section of the PLRA.

So, the ultimate question remains: if Congress did not mean to override Rule 15(d) in enacting section 1997e(e), *what*

is the remedy for a violation of the statute? The answer, again, is simple. If a federal civil action is brought by a confined prisoner "for mental or emotional injury suffered while in custody without a prior showing of physical injury," then the defendant should move the court to dismiss the case under 42 U.S.C. § 1997e(e). If the plaintiff cannot supplement his complaint to cure the defect, then the court should dismiss the case. If, on the other hand, the plaintiff can cure the defect with notice that section 1997e(e) no longer applies to him, because he has been released from custody, then absent "undue delay, bad faith, dilatory tactics, [or] undue prejudice ..., the motion [to supplement under Rule 15(d)] should be freely granted." *Quaratino,* 71 F.3d at 66. Neither this court, nor the Supreme Court, has ever held that when Congress restricts a plaintiff's right to bring a cause of action, we should do anything other than obey the congressional command by using the usual procedures for pleading, adjudication, and dismissal. Absent explicit direction to the contrary, there is no reason to do so today.[12]

---

[12]The majority calls this "no remedy" at all, *ante* at 2747, because the practical effect of such a holding is that plaintiffs who have been released from incarceration following their violation of section 1997e(e) will suffer no sanction (other than the burden of alerting the court to the fact of their release). The majority states, "[w]e disagree, because we do not think the way to enforce congressional enactments is by removing any burden, inconvenience, or expense from those who violate them." *Ante* at 2747. Much like the rest of the majority opinion, this sounds good at first blush but it is ultimately without substance. First, the judicial task is to *enforce Congress' enactments as written,* not to dream up "burden[s], inconvenience[s], [and] expense[s]" to levy on those who violate the congressional command. Where Congress has given us no indication that the remedy we would like to pursue is available under the statute, then it is a violation of the separation of powers for us to enact a remedial scheme that was never envisioned by the legislature. Second, for all its grandstanding about the need to sanction disobedient plaintiffs, the sum total of the "burden[s], inconvenience[s], [and] expense[s]" that the majority has imposed is a second filing fee on plaintiffs, when they re-file their suit after

B.

Lacking any textual or case support, the majority attempts to prop up the court's holding with references to the legislative history that purportedly establish that Congress' single-minded goal in enacting section 1997e(e) was to curtail prisoner "filing[s]" of lawsuits challenging conditions of confinement. *See ante* at 2740, 2744-45. Congress was so driven by its objective to stamp out prisoner "filing[s]," we are told, that once a prisoner commits the unpardonable error of "filing" while still incarcerated, all other considerations are out; the suit must be dismissed come hell or high water. First, it is important to note how crucial this legislative history is to the majority's argument, in an opinion that purports to take a textualist approach to statutory interpretation, *see ante* at 2734-35 ("We begin our construction of section 1997e(e) where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is the words of the statutory provision."). The majority initially tries to justify its holding with the clear language of the statute; this is why its spends so much time trying to answer the mind-numbing question of "whether 'bring' means to commence or start a lawsuit, or instead means to maintain or continue it to conclusion." *Ante* at 2735. As we have already seen, however, the conclusion that "bring" means "commence" does nothing to buttress the court's holding. Under the majority's reading of the statute, it would not matter whether "bring" meant to "commence," to "maintain," or to "immediately cease and

---

being released from incarceration. Finally, as discussed *infra* in Part III, the real "burden[s], inconvenience[s], [and] expense[s]" that flow from the majority's holding are going to be visited upon the *judiciary*, when courts are forced to dismiss suits (sometimes at summary judgment or at trial), and then go through the administrative nightmare of entertaining the same suit *again* when the plaintiff re-files his action.

desist." No matter what the word means, if a prisoner does it while confined, then the case must be dismissed, no questions asked. *This* is the ultimate conclusion that the majority must establish—that whatever section 1997e(e) prohibits, if a person who is confined in a jail, prison, or other correctional facility does it, then Congress intended that courts ignore Rule 15(d) and dismiss the case regardless of whether section 1997e(e) has ceased to apply in the individual's circumstances. The clear text cannot establish this conclusion because section 1997e(e) says nothing about overriding the existing and facially applicable Rules of Civil Procedure. Therefore, in an effort to find a leg to stand on, the "textualist" majority is forced to rely upon the legislative history to make an argument based upon congressional *intent* (and not the words that Congress actually enacted).[13]

---

[13]The absence of textual support (and the resort to congressional intent) becomes especially apparent when the majority attempts to distinguish *Mathews* and all the other cases I cite for the proposition that plaintiffs in the instant case should be allowed to supplement their complaint under Rule 15(d) of the Federal Rules of Civil Procedure. *See ante* at 2745-46. The difference between all of those cases and the instant case, we are told, is that "in this case permitting the plaintiffs to proceed would undermine the statutory purpose of prohibiting these types of claims...." *Ante* at 2746. "Congressional intent" is a tricky thing. Ever since the Legal Realist movement of the early 20th Century, scholars have criticized the whole concept of a legislative "intent" or "purpose" as undiscoverable at best, and at worst, a facade used by activist judges that can be endlessly manipulated in the service of a judge's personal policy preferences. *See, e.g.*, Max Radin, "Statutory Interpretation," 43 *Harv. L.Rev.* 863, 870-71 (1930) ("That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition. The chances that several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given [statutory issue], are infinitesimally small.... Even if the contents of the minds of the legislature were uniform, we have no means of knowing that content except by the external utterances or behavior of these hundreds of men, and in almost every case the only external act is the extremely ambiguous one of acquiescence, which may be motivated in literally hundreds of ways...."). Perhaps this is one reason why,

While its attempt to glean from the legislative history a

in recent years, the federal courts have turned more and more to focus on the *text* of a statute, as opposed to the statutory *purpose* (often revealed in the legislative history). Though congressional intent (and legislative history) still have a legitimate place in the interpretive enterprise, this court has embraced the notion that we should always begin with the statutory text, and that where the congressional command is clear, we should follow the statute as enacted. *See United States v. Gilbert,* 198 F.3d 1293, 1298 (11th Cir.1999) ("We begin our construction of the Hyde Amendment where courts should always begin the process of legislative interpretation, with the words of the statutory provision themselves."); *Kay v. Apfel,* 176 F.3d 1322, 1325 (11th Cir.1999) ("We begin, as we must, with the statutory text itself."); *United States v. Pielago,* 135 F.3d 703, 712 (11th Cir.1998) ("We begin, as always, with the text of the Sentencing Guidelines."); *Hunter v. United States,* 101 F.3d 1565, 1574 (11th Cir.1996) ("We begin where courts interpreting statutory and rule provisions should, with the language of the provisions.").

In the instant case, it is clear that Congress did not abrogate Rule 15(d) when it enacted section 1997e(e). No such abrogation is mentioned in the statutory text. Therefore, under our normal mode of statutory interpretation, we would allow plaintiffs to supplement their complaint to notice the fact of their release, and continue their lawsuit against employees of the GDC. This result is certainly not "absurd," such that we might be entitled to reformulate the statute. *See Rector, Holy Trinity Church v. United States,* 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892). The result the majority reaches, requiring a court to dismiss and then open the plaintiffs' case anew when plaintiffs re-file their action, seems far more bizarre than simply allowing the suit to continue since section 1997e(e) no longer applies in the case. Because the text is clear, and the obvious result is not absurd, it is troubling that a court that has so adamantly embraced a textualist mode of statutory interpretation should now base its decision almost entirely on statutory "purpose." *See ante* at 2746. The difference between the majority position and my own is not "crystalized in [my] proposition that a prisoner who files his claim in direct contravention of section 1997e(e) while he is incarcerated ought to be allowed to continue with that claim after release, because '[p]risoners who are released while their suit is still pending immediately begin to face the same opportunity costs of prosecuting their action as everyone else.' " *Ante* at 2745. The fact that the majority thinks that this is the crucial difference only exposes the degree to which the majority has eschewed the text of section 1997e(e), and has gotten carried away by considerations of policy.

congressional fixation on prisoner "filing" is laudable, the majority misses the mark here as well. In the first place, the "filing" argument is belied by the plain language of the statute, which states that "[n]o Federal *civil action* may be brought by a prisoner confined...." 42 U.S.C. § 1997e(e) (emphasis added). Part III.D.1 of the panel opinion (now reinstated) held that this language only precludes prisoners from bringing *damages actions* for mental or emotional injury suffered while in custody, and does nothing to prevent prisoners from bringing actions for declaratory or injunctive relief. *See Harris*, 190 F.3d at 1287-89. If Congress had wanted to stamp out all prisoner filings, why leave the injunctive avenue of relief available? Under the statute, prisoners can still seek injunctive relief from ongoing mental or emotional injury; they are just precluded from seeking damages.

Moreover, the legislative history, itself, demonstrates that Congress' purpose in enacting section 1997e(e) was a bit more nuanced than stamping out prisoner "filings." The majority unwittingly stumbles upon this conclusion when it opines,

> [a]s the Seventh Circuit has explained, "Congress deemed prisoners to be pestiferous litigants because they have so much free time on their hands and there are few costs to filing suit." *Kerr v. Puckett*, 138 F.3d at 323. The distinction between current and former prisoners makes sense for that reason, and because "[o]pportunity costs of litigation rise following release, diminishing the need for special precautions against weak suits." *Id.*; *see also Madrid v. Gomez*, 190 F.3d 990, 996 (9th Cir.1999) ("[I]t is certainly conceivable that, because of significant potential gains and low opportunity costs, prisoners generally file a disproportionate number of frivolous suits as compared to the population as a whole."); *Tucker v. Branker*, 142

F.3d 1294, 1301 (D.C.Cir.1998) (noting that "prisoners have a lower opportunity cost for their time than other indigent (and in all likelihood, non-indigent) litigants.").

Ante at 2740-41. As the majority indirectly recognizes, the real purpose of section 1997e(e) was not simply to end prisoner "filings," but to curtail what was viewed as the largely meritless litigation (money damages suits for mental or emotional injury) being pursued by a group of people (prisoners) who face uniquely low opportunity costs in pursuing such litigation. The legislative history is replete with references to the idea that *prisoners* put an especially heavy burden on courts' civil dockets because they have little else to do other than think up ways to sue their jailors. *See, e.g.,* 141 Cong. Rec. S7524-26 (daily ed. May 25, 1995) (statements by Senators Dole and Kyl) (prisoners have a unique incentive to file frivolous lawsuits because litigation "has become a recreational activity for long-term residents of our prisons," because prisoners "have little to lose and everything to gain," and because frivolous complaints are "a means of gaining a short sabbatical to the nearest Federal courthouse") (citations and internal quotation marks omitted). If Congress just wanted to cut down on court "filings," why focus on prisoners at all? Congress could have focused its attention on any number of groups that were deemed to be especially litigious. Instead, however, Congress chose to preclude the bringing of federal civil actions by *prisoners* because *they* constituted the group that was particularly well-positioned in the litigation arena. Prisoners have more free time, and often easier access to legal resources than most of the American population. *See Bounds v. Smith,* 430 U.S. 817, 828, 97 S.Ct. 1491, 1498, 52 L.Ed.2d 72 (1977) (holding "that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law"); *but see Lewis v. Casey,* 518 U.S. 343, 116 S.Ct. 2174,

135 L.Ed.2d 606 (1996) (holding that *Bounds* did not eliminate the requirement that an inmate allege actual injury that has resulted from a deprivation of adequate legal resources before he can gain standing to sue in federal court). Because they often file as indigents, prisoners have less to lose and more to gain by bringing lawsuits than the average citizen.

This understanding of the legislative purpose contradicts the majority's holding that a court should dismiss a plaintiff's action under section 1997e(e) even if the plaintiff is no longer incarcerated. As the Seventh Circuit has recognized, the "[o]pportunity costs of litigation rise following release, diminishing the need for special precautions against weak suits." *Kerr*, 138 F.3d at 323.[14] If the purpose of the PLRA was

---

[14]Aside from the majority's bald assertion that "the Seventh Circuit would reach ... the same [result as the majority reaches today,]" *ante* at 2737 (thus invoking the "thin air" doctrine, *see Carlisle v. United States*, 517 U.S. 416, 429, 116 S.Ct. 1460, 1468, 134 L.Ed.2d 613 (1996)), there is no indication that the Seventh Circuit would agree with the majority's holding today under the reasoning of *Kerr*. In that case, Judge Easterbrook went on at some length about the need for courts to "implement the [statutory] language actually enacted." *Kerr*, 138 F.3d at 323. In response to the district court's argument that "common sense" necessitated that section 1997e(e) bar the claims of former prisoners who had been released from custody, the court responded:

> "Common sense" is a treacherous guide to statutory interpretation. One person's "common sense" is another's *bete noire*. Statutes are compromises among legislators who may hold incompatible conceptions of the public weal. Some legislators opposed the PLRA outright; others wanted more sweeping restrictions on prisoners' litigation; the actual statute satisfied few completely. Instead of relying on "common sense", which is an invitation to treat the law as if one side or the other had its way, a court should implement the language actually enacted—provided the statute is not internally inconsistent or otherwise absurd.

Id. How this language could support the majority's contention that we should

to curtail frivolous *prisoner* litigation, then there is no reason to apply it to persons who are no longer prisoners under the meaning of the Act. Prisoners who are released while their suit is still pending immediately begin to face the same opportunity costs of prosecuting their action as everyone else. They no longer have the same free time or access to legal resources as they did while in custody. Treating former prisoners as if they were still prisoners by dismissing their complaints under section 1997e(e) not only contravenes the clear language of the statute, and Rule 15(d) of the Federal Rules of Civil Procedure, but it also fails to make any sense in light of the statutory purpose.

C.

Because today's holding is contradicted by the clear language of the PLRA, ignores Rule 15(d) of the Federal Rules of Civil Procedure, departs radically from all applicable case law, is unsupported by the legislative history, and makes no sense in light of the statutory purpose (thus exhausting all legitimate avenues of statutory construction), I can only conclude that the majority is dissatisfied with what Congress has done in enacting section 1997e(e). The real problem the majority has in this case is that former prisoners can file suits "for mental or emotional injury suffered while in custody without a prior showing of physical injury" on the day they are released from incarceration. It is difficult to argue that Congress wanted courts to enforce the PLRA with such vigor that they should ignore the normal rules of pleading, and disallow supplements indicating that a plaintiff has been released from custody, when what Congress actually did was to enact a statute that ceases to apply on the same day a prisoner is released. The two notions do not gel; the majority's "dog

---

extend the PLRA to cover suits by former prisoners to whom the statute no longer applies, by reading the statute to preclude supplemental pleadings to notice the fact of the prisoners' release, escapes me.

won't hunt." *Reynolds v. Roberts*, 207 F.3d 1288 (11th Cir.2000).

The majority has therefore sought to enhance the PLRA with an interpretation that is not supported by the statutory text. Seizing on a few passages from the legislative history (none of which are even remotely related to the issue of supplemental pleadings), the majority has tried to "put some teeth" into the PLRA, *ante* at 2738 (quoting *Gay v. Texas Dept. of Corrections State Jail Div.*, 117 F.3d 240, 242 (5th Cir.1997)), by levying one all-purpose sanction on any prisoner who seeks to prosecute a claim for mental or emotional injury, even if the PLRA no longer applies in his case. Why this dissatisfaction with the statute that Congress actually enacted? The answer can be found in the majority's discussion of the number of prisoner filings, bemoaning the fact that "[l]ast year alone, there were 3,465 prisoner lawsuits filed in the district courts of this circuit." *Ante* at 2742.[15] The PLRA may go some distance in reducing the volume of prisoner litigation, but the majority has decided that it does not go far enough. So, because Congress did not quite get it right, we will "help out the legislature" today by means of a judicial amendment that takes the unprecedented step of inferring a remedy for a violation of section 1997e(e) that can be found nowhere in the statute, and that was never mentioned during the legislative debates.

---

[15] I dislike frivolous prisoner litigation as much as my colleagues do. Suits that are truly meritless (such as Eighth Amendment claims that prisoners have a constitutional entitlement to chunky peanut butter, *see* 141 Cong. Rec. S14408-01, S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole)) impair the courts' judicial resources, and increase overall delay—at both the trial and appellate levels—in a circuit that is already extraordinarily burdened. Frustration with frivolous lawsuits, however, does not give us the authority to enact legislation to cure the problem. We are bound by Congress' enactments, and where Congress has spoken to the question of remedies, we may go no further.

Congress could have done a lot of things when it enacted the PLRA. It could have provided for criminal penalties for a violation of section 1997e(e), or a civil fine to be imposed every time a prisoner files while incarcerated. It even could have rendered Rule 15(d) inapplicable in prisoner litigation, so that a prisoner would be precluded from supplementing his complaint to reflect the fact of his release. We know that when Congress wanted to alter the Rules of Civil Procedure, as in section 1997e(c)(1) (court shall "on its own motion ... dismiss any action ... [that is] frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief"), it certainly knew how to do so. Congress, however, provided for none of these remedies for a violation of section 1997e(e). It simply provided that "[n]o Federal civil action may be brought." Without congressional authorization, it is utterly inconceivable that the majority could infer from these words such a drastic remedy as dismissal, regardless of whether the statute actually applies.

In an effort to assist Congress in stamping out prisoner lawsuits, the majority has forgotten the one very basic, but fundamental truth that "there is no liberty if the power of judging be not separated from the legislative and executive powers." *The Federalist No. 78,* at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (quoting Montesquieu, *The Spirit of the Laws,* vol. I, p. 181). Quite frankly, it is not our job to "put some teeth" into the PLRA, or any other statute that Congress enacts; our job is to follow the congressional command by enforcing the statute as written. "Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvements." *Badaracco v. Commissioner,* 464 U.S. 386, 398, 104 S.Ct. 756, 764, 78 L.Ed.2d 549 (1984); *see also Blount v. Rizzi,* 400 U.S. 410, 419, 91 S.Ct. 423, 429, 27 L.Ed.2d 498 (1971) ("[I]t is for Congress, not this Court, to rewrite the statute."); *Korman v. HBC Florida, Inc.,* 182 F.3d 1291, 1296 (11th Cir.1999) ("It is

not the business of courts to rewrite statutes."); *cf. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865, 104 S.Ct. 2778, 2793, 81 L.Ed.2d 694 (1984) ("Courts must, in some cases, reconcile competing political interests, but not on the basis of judges' personal policy preferences."); *cf. also Chandler v. James*, 180 F.3d 1254, 1275 (11th Cir.1999) (Tjoflat, J., specially concurring) (discussing the separation of powers concerns that arise when courts use the injunctive remedy beyond what Congress has prescribed). The fact that the majority thinks that it is following Congress' purpose is no justification for encroaching upon the legislative domain by inferring remedies that cannot plausibly be drawn from the statutory language. When we blur the boundaries between the judicial and political branches, we threaten the supremacy of the legislature when it comes to the creation of law.

III.

The immediate effects of today's decision are troubling. Despite the majority's desire to cut down on prisoner litigation, today's holding will simply spawn needless litigation as the district courts in this circuit are forced to dismiss a prisoner's case without prejudice, and then reconsider the case without the physical injury component after the prisoner is released from custody. I appreciate the majority's candor in acknowledging that because "some ... claims will be re-filed after the [prisoner] is released ..., more total effort may well be required to adjudicate those particular claims than if [the majority's interpretation of] the section 1997e(e) bar did not exist." *Ante* at 2743. I doubt, however, that the majority realizes the magnitude of the "total effort" that district courts will now have to invest in implementing today's decision. The issue of whether a prisoner can meet section 1997e(e)'s physical injury requirement may not be decided, in many cases, until summary judgment or at trial. Thus, a district court now faces the

prospect of bringing its resources to bear on a prisoner's claim, only to conclude on motion for summary judgment or at trial that, since the prisoner suffered no physical injury, it must dismiss the case. The court's efforts will have gone for naught because its determination that there was no physical injury will be of no moment in the court's consideration of the former prisoner's claim, asserted in a new suit filed subsequent to his release, that he suffered mental or emotional injury while in custody.

Following, I set out Congress' purpose in enacting section 1997e(e). I then compare, in light of the congressional purpose, the practical effects of my interpretation of section 1997e(e), with the practical effects that will surely flow from the majority's interpretation.

A.

As noted *supra* in Part II.B, the purpose of section 1997e(e) was not just to cut down on prisoner "filing." Such a myopic view of the statute misses the forest for only one tree. The purpose of the statute was to curtail what was viewed as the largely meritless litigation (money damages suits for mental or emotional injury) being pursued by a group of people (prisoners) who face uniquely low opportunity costs in pursuing such litigation. This broad understanding of the congressional design actually imputes two, interrelated motives to Congress. In enacting the PLRA, Congress sought to (1) conserve judicial resources, and (2) continue to allow prisoners to pursue meritorious litigation.

First, Congress sought to preserve judicial resources by enacting a series of measures that function as gate-keepers to

the district courts.[16] Prior to the enactment of the PLRA, 28 U.S.C. § 1915(d) was the only gate-keeping mechanism that district courts had at their disposal to screen out frivolous prisoner lawsuits. That section allowed a court to dismiss a case, *sua sponte*, if the court was "satisfied that the action [was] frivolous or malicious." 28 U.S.C. § 1915(d) (1994). Because Congress deemed section 1915(d) inadequate to safeguard judicial resources from the onslaught of prisoner lawsuits, it enacted several provisions of the PLRA to serve as heightened gate-keepers.

28 U.S.C. § 1915(b), for example, qualifies a prisoner's right to bring a civil action *in forma pauperis* by requiring partial payment of the filing fee up-front, and then monthly payments to cover the balance of the fee. This provision increases the costs of bringing a civil action for the prisoner, and thus makes it more likely that prisoners will only bring suits that have some merit. Certainly, section 1915(b) will decrease prisoner "filings." But why is that, in the view of Congress, a good thing? The answer, of course, is because fewer "filings" means *fewer judicial resources expended on prisoner lawsuits*. The ultimate goal is not just to decrease prisoner "filings;" *the goal is to save the judiciary the expenditure of time and resources*.

The same is true of section 1997e(e). The requirement that prisoners demonstrate physical injury serves as a gate-keeping mechanism by screening out a certain class of cases—cases in which a prisoner seeks damages for mental or emotional injury only. This raises the bar on a prisoner who wants to bring a damages action while incarcerated, by forcing

---

[16] In enacting the PLRA, Congress also sought to preserve state court resources. Because this case focuses on litigation in the federal courts, I tailor my remarks accordingly.

the prisoner to demonstrate an element (physical injury) that is not necessarily required to state a claim for relief under the Eighth Amendment.[17] Thus, the district courts' resources are preserved for cases in which a prisoner can demonstrate physical injury. A court is empowered to make an up-front determination of whether the prisoner has alleged injury sufficient to meet the section 1997e(e) requirement; if not, then the case can be disposed of without substantially taxing the court's resources.

The second purpose animating the PLRA is Congress' desire to continue to allow prisoners to pursue meritorious litigation. The legislative history is replete with examples of frivolous prisoner lawsuits that were so ridiculous that they would be humorous, but for the fact that they were constituting a serious drain on judicial resources. *See, e.g.*, 141 Cong. Rec. S7498-01, S7524 (daily ed. May 25, 1995) (statement of Sen. Dole) ("[P]risoners have filed lawsuits claiming such grievances as insufficient storage locker space, being prohibited from attending anniversary party, and yes, being served creamy peanut butter instead of the chunky variety they had ordered."); 141 Cong. Rec. S14408-01, S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) ("In one frivolous case ..., an inmate sued demanding that he be issued Reebok or L.A. Gear brand shoes instead of the Converse brand being issued. In another case, an inmate deliberately flooded his cell, then sued the officers who cleaned up the mess because they got his Pinochle

---

[17] As Justice Blackmun wrote in *Hudson v. McMillian*, "[i]t is not hard to imagine inflictions of psychological harm—without corresponding physical harm—that might prove to be cruel and unusual punishment." He cited as an example, "*Wisniewski v. Kennard*, 901 F.2d 1276, 1277 (5th Cir.) (guard plaining revolver in inmate's mouth and threatening to blow prisoner's head off), *cert. denied*, 498 U.S. 926, 111 S.Ct. 309, 112 L.Ed.2d 262 (1990)." *Hudson v. McMillian*, 503 U.S. 1, 16, 112 S.Ct. 995, 1004, 117 L.Ed.2d 156 (1992) (Blackmun, J., concurring).

cards wet."); 141 Cong. Rec. S14611-01, S14626 (daily ed. Sept. 29, 1995) (statement of Sen. Reid) (among "top 10 lawsuits in Nevada filed by prisoners," were claims that the prisoner should not be required to open his window slot when meals are served, that the delivery of mail interfered with prisoner's usual sleeping pattern, and that the prisoner was given a size five tennis shoe, when the actual size of his foot was four and three-fourths). It is this class of litigation, *frivolous* prisoner lawsuits, that Congress sought to screen out. Congress had no intent to prevent meritorious suits filed by prisoners from being adjudicated in the courts.

Section 1997e(e) perfectly illustrates the congressional desire to continue to allow prisoners to bring meritorious lawsuits. Congress could have eliminated *all* damages actions by plaintiffs confined in a jail, prison, or other correctional facility. This would certainly have been the most effective route if Congress' sole purpose in enacting the PLRA was to conserve judicial resources. But section 1997e(e) only affects actions brought solely for mental or emotional injury, and does not impair a prisoner's right to bring an action for physical injury. Why the distinction? Obviously, Congress made a determination that suits brought solely for mental or emotional injury were more likely to be without merit than cases in which a prisoner sustains some physical injury.

This determination certainly comports with traditional legal principles; tort law, for example, is notorious for redressing the claims of those who have undergone a nonconsensual "touching," while virtually ignoring those who claim to have suffered some damage from "verbal harassment." Because Congress wanted to conserve judicial resources while still allowing prisoners to pursue meritorious litigation, it identified a certain class of cases as being particularly likely to be without merit—cases in which prisoners sued for mental or emotional injury only—and then screened off those cases as not

deserving of judicial consideration.

B.

My interpretation of section 1997e(e) is faithful to the congressional purpose of conserving judicial resources while still allowing prisoners to pursue meritorious claims. Consider a case in which a prisoner alleges that prison guards physically abused him, and seeks damages for both the physical injury, and the mental or emotional distress that resulted. In one scenario, the case will move along, the parties will engage in discovery, and the defendant will move for summary judgment, contending that the prisoner has failed to demonstrate physical injury and that the case should therefore be dismissed. Before the court rules on the defendant's motion, assume that the plaintiff is released from incarceration, and seeks to supplement his complaint to notice the fact of his release and to delete his allegation of physical injury.

If, as under my interpretation of section 1997e(e), the court has discretion to permit the supplement, then the court can adjudicate the plaintiff's claim for mental or emotional injury only. The section 1997e(e) bar will no longer apply, and the court can adjudicate the case in one proceeding. The judicial machinery will only be set in motion *one time* in order to dispose of the *whole case.*

Now consider a second scenario. It is entirely likely that many prisoners will be able to proffer enough evidence of physical injury to preclude the court from dismissing their claims for damages on motion for summary judgment. In that case, the issue of whether the prisoner suffered physical injury will go to *trial.* If a prisoner is released from incarceration during trial, then under my interpretation of section 1997e(e), the district judge will have discretion to allow the plaintiff to supplement his complaint, and to delete his allegation of

physical injury. Because the court is able to exercise its discretion, the parties can litigate the claim for mental or emotional injury to final judgment. Again, the section 1997e(e) bar will no longer apply, and the court will only have to oversee *one proceeding* in order to dispose of the *whole case*.

The key to understanding this interpretation of section 1997e(e) is to realize that the value of the statutory provision, in terms of conserving judicial resources, depends on *how quickly the district judge acts on a prisoner's complaint*, specifically, the prisoner's allegation of physical injury. If the district judge can determine from the pleading that the prisoner has failed to allege physical injury sufficient to withstand the section 1997e(e) bar, then the litigation has not cost very much in terms of judicial resources. It is true that the prisoner will be able to re-file his claim for mental or emotional injury once he is released, and thus subject the judiciary to two, almost identical lawsuits. But the costs of dismissing the suit while the prisoner was incarcerated were not very high; therefore, the sanction of forcing the prisoner to re-file the case once he is released has not come at a high cost to the judiciary.

The further along the case proceeds, the more it costs in terms of judicial resources, and the closer the date of the prisoner's release from custody. If the case reaches the summary judgment stage or goes to trial, then a substantial amount of judicial effort has been invested in determining whether the prisoner suffered physical injury. If the prisoner is released from incarceration, and the court determines (either on summary judgment or at trial) that his evidence of physical injury is insufficient, the costs of dismissing the case, requiring the former prisoner to re-file it, and forcing the court to entertain the litigation all over again, impose a *very* high price on the judiciary. This is because once the case is re-filed, the court will have to address it anew. All of the court's work in determining whether the plaintiff suffered physical injury will

have been for naught, because physical injury will no longer be an element of the plaintiff's claim. This seems like an exorbitantly high price to pay merely to extract a second filing fee from the plaintiff (who may not have to pay the filing fee after all, because he will likely be able to proceed *in forma pauperis*). Thus, the sensible solution, and the solution obviously intended by Congress when it fashioned section 1997e(e) not to abrogate Rule 15(d), is to allow released prisoners to supplement their complaints and continue their lawsuits.

C.

Today's holding, on the other hand, requires a district court to engage in the administrative absurdity of dismissing a case no matter what stage the litigation has reached, and regardless of whether the plaintiff has been released from incarceration, and then entertain the case anew when the former prisoner files his action again.[18] In the first scenario discussed above (where plaintiff seeks to supplement his complaint to notice the fact of his release and withdraw his allegation of physical injury before summary judgment is entered), the court's holding today will mean that the district court will lack discretion to permit the supplement. Thus, if the court resolves the issue of physical injury against the plaintiff—because it either treats the plaintiff's motion as a concession that the plaintiff cannot demonstrate physical injury, or grants partial summary judgment on the issue of physical injury—it will have to dismiss (without prejudice) the case under section 1997e(e).

---

[18] As opposed to the majority's somewhat exotic hypothetical where a prisoner is confined, and then released, and then picked up again and jailed, and then bailed out, and then returned to prison, *ante* at 2741, the spectacle of a court dismissing an action, just so it can entertain the action again when the former prisoner files his action anew is not hypothetical; it is the result of the majority opinion.

The plaintiff will immediately re-file, seeking damages for mental or emotional injury only. The court will then be forced to consider, in a second proceeding, the plaintiff's claim for mental or emotional injury, all because it had to dismiss the previous case under the court's holding today. All the court's work in the previous case will have been for naught.

The even worse scenario, of course, is where the prisoner's case actually goes to trial. If a court cannot grant the released prisoner's motion to supplement at trial, then the court faces the prospect of dismissing the case under section 1997e(e) (even though the plaintiff has been released from incarceration), and then adjudicating the case once again when the plaintiff re-files for mental or emotional injury. In this scenario, the court' s holding today will force the district court to engage in a full-blown trial that will ultimately serve no purpose other than requiring the plaintiff to pay a second filing fee (in the event that he is ineligible for *in forma pauperis* status).

The majority's interpretation not only wastes judicial resources; it is also unfaithful to the second congressional purpose of continuing to allow prisoners to pursue meritorious lawsuits. If a prisoner is able to surmount the summary judgment hurdle—that is, convince a district judge that his claim for physical injury has enough evidentiary support to warrant a fact determination—then his case is meritorious by definition. Thus, by forcing district courts to dismiss a plaintiff's case whenever it becomes apparent that the plaintiff has suffered no physical injury (even if that determination is not made until trial), the court's holding punishes plaintiffs *who did not violate section 1997e(e).* It is at least arguable that if a plaintiff can get by summary judgment on the issue of physical injury, then he did not bring a case "for mental or emotional injury suffered while in custody without a prior showing of

physical injury." 42 U.S.C. § 1997e(e).[19] It therefore seems odd to punish a plaintiff (by dismissing his case and forcing him to pay a second filing fee) after his release from incarceration, when the action, as originally brought, was meritorious. The majority punishes a whole class of plaintiffs (those who bring meritorious cases) who Congress never intended to subject to punishment.

In addition to unduly taxing district court resources, the court also imposes a burden on defendants to defend the action all over again when plaintiffs re-file. After the defendant has already invested enormous amounts of time and money in

---

[19] There are two ways that one could read section 1997e(e)'s proscription on bringing suits for mental or emotional injury suffered while in custody without a prior showing of physical injury. One could interpret the provision as precluding a prisoner from bringing all damages actions in which the trier of fact does not ultimately find that the prisoner suffered physical injury. Alternatively, one could read the statute as precluding only those lawsuits in which the prisoner does not have enough evidence of physical injury to get past summary judgment. It seems unlikely that Congress intended the first interpretation. The issue of whether the prisoner intentionally violated section 1997e(e) would become irrelevant to the statutory construction, because if the prisoner has enough evidence of physical injury to surpass the summary judgment hurdle, he obviously did not intend to violate the statute when he filed his suit. If a district court does not grant summary judgment to the defendant, then when the prisoner brought the action, the case was meritorious enough to preclude a district judge from throwing it out. Whether the prisoner's violation of section 1997e(e) was intentional, however, must at least play some role in our interpretation; this is because, as discussed *supra*, in enacting section 1997e(e) Congress only intended to screen out *frivolous* suits from the district courts' dockets. The focus was on punishing those prisoners who repeatedly abuse the judicial process by filing claims that are patently without merit. This does not mean that we should impose some *mens rea* requirement on the functioning of section 1997e(e). But the issue of intent, as it relates to whether a prisoner's case is so frivolous that he obviously knew he was violating section 1997e(e) when he brought the action, is relevant to determining whether a violation has actually occurred.

defending the lawsuit, why would the defendant ever want the court to dismiss the case without resolving all of the plaintiff's claims? If the court dismisses the action, then the plaintiff will re-file, and the defendant will have to defend a second time. Because a defendant will most likely want the court to address the plaintiff's whole case (including the plaintiff's claim for mental or emotional injury only) in one proceeding, the defendant may request the court to grant the plaintiff's motion to supplement and carry the case to final judgment. If the court granted the defendant's request, its ruling would be insulated from appellate review under the invited error doctrine.

The majority's sole justification for imposing on the district courts' scarce resources is that a prisoner who violates section 1997e(e) must be made to suffer some "burden, inconvenience, or expense," *ante* at 2747. The sum total of this "burden, inconvenience, or expense" comes down to this: the former prisoner will have to pay a second filing fee when he re-files his claims for mental or emotional injury. There are two reasons why the majority's "burden, inconvenience, or expense" may be no burden at all.

First, because the PLRA will no longer apply, it is likely that many former prisoners will not have to pay a second filing fee, because they will be entitled to file *in forma pauperis* under 28 U.S.C. § 1915(a)(1). Second, even if they do have to pay the fee, this punishment will have been extracted at a disproportionate cost to the judiciary, and the defendant. As discussed above, if the district judge is forced to dismiss the case at summary judgment or trial (even though the plaintiff has been released from incarceration, and thus relieved of the burden of demonstrating physical injury), then all the time and resources invested by the court and the defendant will have been wasted. When one compares the cost of a second filing fee to the plaintiff with the costs today's decision imposes upon the judicial system, one wonders exactly who the majority seeks to

punish in this case.

IV.

For the foregoing reasons, I dissent from the court's holding that section 1997e(e) of the PLRA required the district court to dismiss plaintiffs' complaint, even though that section no longer applies to plaintiffs because they are no longer prisoners within the meaning of the Act. I would reinstate fully the panel opinion in this case, vacating the district court's dismissal of claims for compensatory and punitive damages for plaintiffs Chadwick, Harris, Cook, Hooks, Nation, and Dailey, and remanding the case to the district court for further proceedings.

I concur in the court's judgment insofar as it reinstates those parts of the panel opinion that dispose of the claims of plaintiffs Locklear, Kilgore, Langes, Brinkley, and Wade.

APPENDIX 2:
Harris v. Garner, 190 F.3d 1279
(11th Cir. Sept. 30, 1999)

Frederick Lamar HARRIS, Danny Chadwick, et al., Plaintiffs-Appellants,

v.

Wayne GARNER, Commissioner of the Georgia Department of Corrections, A.G. Thomas, Director of Facilities Division of the Georgia Department of Corrections, et al., Defendants-Appellees.

No. 98-8899.
United States Court of Appeals,
Eleventh Circuit.
Sept. 30, 1999.

Appeal from the United States District Court for the Middle District of Georgia. (No. 5:97-CV-79-4 (HL), Hugh Lawson, Judge.

Before TJOFLAT and BIRCH, Circuit Judges, and BRIGHT**********, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

In this case the parties ask us to answer several important questions relating to two provisions of the Prison Litigation Reform Act of 1995, Pub.L. No. 104-134, 110 Stat. 1321 (1996) (codified in scattered sections of 42 U.S.C.) ("PLRA"). 42 U.S.C. § 1997e(a) (Supp. II 1996) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional

---

**********Honorable Myron H. Bright, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(e) (Supp. II 1996) provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."

Today, we address (1) whether section 1997e(e) applies to former prisoners who file a claim for injuries suffered while in custody, after they have been released from incarceration; (2) whether section 1997e(a) requires prisoners to exhaust all administrative remedies before they bring a federal law action with respect to prison conditions, even if it would be futile for the prisoner to seek such administrative remedies, and even though the administrative remedies are inadequate; (3) what level of injury must be sustained for a prisoner to meet the section 1997e(e) requirement that the prisoner must make a "prior showing of physical injury" before filing suit for "mental or emotion injury suffered while in custody;" and (4) the constitutionality of section 1997e(e).

I.

Eleven prisoners brought this civil rights suit for damages and injunctive relief[1] in the United States District Court for the Middle District of Georgia against employees of

---

[1]Plaintiffs' complaint alleges violations of plaintiffs' Fourth, Eighth, and Fourteenth Amendment rights under the United States Constitution, but cites no statutory authority for the relief they seek; presumably they sought relief under 42 U.S.C. § 1983 (1994 & Supp. II 1996): "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.... "

the Georgia Department of Corrections ("GDC").[2] The plaintiffs alleged violations of the their Fourth, Eighth, and Fourteenth Amendment rights as a result of actions allegedly taken by the defendants during a "shakedown" at Georgia's Dooly State Prison facility.[3] According to the plaintiffs, members of a special prison "Tactical Squad," led by Commissioner Wayne Garner of the GDC, stormed the prison facility on October 23, 1996. The squad officers ordered prisoners to strip naked, and performed body cavity searches while members of the opposite sex were present;[4] physically harassed some prisoners; ordered one inmate to "dry shave;"[5] made harassing comments to an inmate because of his perceived sexual orientation; and ordered one prisoner to "tap dance" while naked.

The district court referred the case to a magistrate judge in accordance with 28 U.S.C. § 636 (1994). On February 4, 1998, before the magistrate judge had issued his recommendation in the case, six plaintiffs, who had been

---

[2]The complaint was filed against "Wayne Garner, Commissioner of the Georgia Department of Corrections; A.G. Thomas, Director of Facilities Division of the Georgia Department of Corrections; Duke Blackburn, Executive Assistant, Special Operations of the Georgia Department of Corrections; and Twenty-Two Unnamed Tactical Squad Officers of the Georgia Department of Corrections, in their individual and official capacities."

[3]In this context, a prison "shakedown" is a systematic search of a correctional institution wherein prison officials search for illegal drugs and other contraband by means of body cavity searches, searches of inmates' living quarters, and searches of other areas of the institution.

[4]Georgia's Dooly State Prison is an all male correctional facility that employs female staff members.

[5]"Dry shaving" refers to the practice of shaving with an unlubricated razor.

released from custody, moved the court for leave to withdraw their claims for injunctive relief, because their release had mooted such claims. *See Tucker v. Phyfer*, 819 F.2d 1030, 1033 (11th Cir.1987). In his recommendation to the district court, the magistrate judge treated the complaint as amended in accordance with the plaintiffs' motion.

After receiving the magistrate judge's recommendation, the district court divided the plaintiffs into four classes according to their different factual circumstances, and issued a ruling particular to each class as follows:

First, the court found that plaintiffs Danny Chadwick, Frederick Harris, Lenois Cook, Willie Hooks, Farrell Nation, and William Dailey had been released from the GDC. As such, their claims for injunctive relief were moot. The court also granted defendants' 12(b)(6) motion and dismissed with prejudice these plaintiffs' claims for compensatory and punitive damages because they did not allege any physical injury. The court thus reasoned that the claims were barred by section 1997e(e)'s physical injury requirement. The magistrate judge's recommendation, adopted with only slight modification by the district court, expressly relied on the holding that " § 1997e(e) is applicable to the claims of prisoners who have been released."

Second, the district court dismissed without prejudice the claims of plaintiffs Samuel Locklear, Alan Kilgore, and Leroy Langes because these plaintiffs had not yet exhausted all of their administrative remedies and thus had not satisfied the exhaustion requirement of section 1997e(a). The court also found that these plaintiffs' claims for compensatory and punitive damages were barred by section 1997e(e) because they did not allege the requisite physical injury.

Third, the court dismissed without prejudice the claims

of plaintiff Dayton Brinkley because he had not yet exhausted all of his administrative remedies and had thus not satisfied section 1997e(a). The court also found that Brinkley's claims for compensatory and punitive damages were not barred by section 1997e(e) because he alleged the requisite physical injury. Before he could submit any claims to a court, however, Brinkley would have to exhaust his administrative remedies.

Finally, the court granted defendants' 12(b)(6) motion and dismissed with prejudice plaintiff James Wade's claims for compensatory and punitive damages because even though Wade was still in prison and had exhausted all of his administrative remedies, his allegations of physical injury were not serious enough to satisfy the physical injury requirement of section 1997e(e). Accordingly, the claims were barred. The court did not address Wade's claims for injunctive and declaratory relief.

Plaintiffs timely appealed.

II.

We review de novo the district court's dismissal of a complaint for failure to state a claim upon which relief could be granted. *See Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 948 (11th Cir.1997). When considering a Rule 12(b)(6) motion to dismiss, a court must accept the allegations in the complaint as true, construing them in the light most favorable to the plaintiffs. *See Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1307 (11th Cir.1998), *cert. denied*, --- U.S. ----, 119 S.Ct. 1027, 143 L.Ed.2d 38 (1999). We have done so in setting out the facts, above. A Rule 12(b)(6) motion to dismiss should be granted only if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their allegations which would entitle them to relief. *See id.*

We also review de novo dismissals for failure to exhaust administrative remedies under section 1997e(a). *See Alexander v. Hawk*, 159 F.3d 1321, 1323 (11th Cir.1998).

III.

A.

The district court treated the complaint as amended for the six plaintiffs who were released from the GDC before the magistrate judge issued his report and recommendation, and thus correctly dismissed those plaintiffs' claims for injunctive relief as moot. *See Tucker*, 819 F.2d at 1033 ("If the plaintiff's claim is not live, the court lacks a justiciable controversy and must dismiss the claim as moot."). Relying in part on *Zehner v. Trigg*, 952 F.Supp. 1318, 1323-27 (S.D.Ind.1997), the district court also held that " § 1997e(e) is applicable to the claims of prisoners who have been released" and thus dismissed with prejudice the released prisoners' claims to compensatory and punitive damages because of a failure to allege physical injury. We find that the district court erred with regard to its section 1997e(e) holding.

First, let us be clear that at the point at which the district court treated the released prisoners' complaint as amended, those six plaintiffs became *former prisoners* who had filed a complaint for monetary damages against employees of the GDC for injuries suffered while in custody.

As noted above, 42 U.S.C. § 1997e(e) provides: "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." Section 1997e(h) defines a "prisoner" as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated

delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 42 U.S.C. § 1997e(h) (Supp. II 1996). According to the plain language of the statute, section 1997e(e) does not apply to former prisoners, or those who have been released from a correctional facility, because such persons are clearly not "confined in a jail, prison, or other correctional facility," or "incarcerated or detained in any facility." The statute could not be more plain: it applies to those who (a) seek a civil remedy for mental or emotional injury suffered while in custody, and (b) seek such a remedy while they are incarcerated. As the Seventh Circuit has noted in analyzing section 1997e(e), "[t]he statutory language does not leave wriggle room." *Kerr v. Puckett,* 138 F.3d 321, 323 (7th Cir.1998). It does not apply to persons who have never been prisoners; nor does it apply to former prisoners who seek civil relief for injuries suffered while they were prisoners.

Defendants argue that Congress' purpose in enacting the PLRA was to curtail frivolous prisoner litigation, and that reading the statute to bar certain claims by current but not former prisoners is not faithful to congressional intent because, under our interpretation today, some claims "for mental or emotional injury suffered while in custody" can be brought "without a prior showing of physical injury." Further, defendants see little sense in discriminating between prisoners who bring suit while they are incarcerated, and former prisoners who seek relief on the same day they are released.

Absent mistake or absurdity, we implement the statutory language as enacted. *Salinas v. United States,* 522 U.S. 52, 57-58, 118 S.Ct. 469, 473-74, 139 L.Ed.2d 352 (1997). Here, the language of section 1997e(e) could not be clearer. And contrary to defendants' congressional intent argument, Congress manifestly wanted to draw a bright line distinction between

those who *are* prisoners, and those who are *not* prisoners. *See* 141 Cong. Rec. S7524-26 (daily ed. May 25, 1995) (statements by Senators Dole and Kyl) (prisoners have a unique incentive to file frivolous lawsuits because litigation "has become a recreational activity for long-term residents of our prisons," because prisoners "have little to lose and everything to gain," and because filing frivolous complaints is "a means of gaining a short sabbatical in the nearest Federal courthouse") (citations and internal quotation marks omitted). The distinction makes a good deal of sense because the "[o]pportunity costs of litigation rise following release, diminishing the need for special precautions against weak suits." *Kerr*, 138 F.3d at 323. In light of the overwhelming clarity of the statutory text, we join the Seventh Circuit in holding that section 1997e(e) applies only to prisoners who are incarcerated at the time they seek relief, and not to former prisoners who seek damages for injuries suffered while they were incarcerated. *See id.; see also, Greig v. Goord*, 169 F.3d 165, 167 (2nd Cir.1999) (interpreting "prisoner" as used in section 1997e(a), dealing with administrative exhaustion, as not applying to former prisoners no longer incarcerated); *Doe v. Washington County*, 150 F.3d 920, 924 (8th Cir.1998) (interpreting "prisoner" as used in section 1997e(d), dealing with attorneys' fees, as not applying to former prisoners).

B.

The district court dismissed without prejudice two categories of plaintiffs because they failed to exhaust their administrative remedies before bringing suit and thus failed to satisfy the exhaustion requirement of section 1997e(a).[6] That

---

[6]The district court dismissed without prejudice the claims of Locklear, Kilgore, and Langes for failure to exhaust administrative remedies, and also held that these plaintiffs' claims for compensatory and punitive damages were barred by section 1997e(e). Separately, the district court dismissed

section provides: "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

Plaintiffs make a valiant argument that they should not be required to exhaust their administrative remedies before being allowed to proceed in court because (1) the GDC's treatment of similar claims demonstrates that it would be futile for plaintiffs to pursue administrative relief, and (2) no administrative relief is "available" to plaintiffs because the GDC Inmate Grievance Procedures do not provide for the monetary damages award plaintiffs seek. At least with regard to the issue of what remedies are "available" under section 1997e(a), some courts have agreed with the plaintiffs. *See Whitley v. Hunt*, 158 F.3d 882, 887 (5th Cir.1998); *Lunsford v. Jumao-As*, 155 F.3d 1178, 1179 (9th Cir.1998); *Garrett v. Hawk*, 127 F.3d 1263, 1267 (10th Cir.1997). But we think the disposition of this issue is controlled by our recent decision in *Alexander v. Hawk*, 159 F.3d 1321 (11th Cir.1998).

In *Alexander*, we held that "the judicially recognized futility and inadequacy exceptions do not survive the new mandatory exhaustion requirement of the PLRA.... Since exhaustion is now a pre-condition to suit, the courts cannot simply waive those requirements where they determine they are

---

without prejudice plaintiff Brinkley's claims for failure to exhaust administrative remedies, but held that Brinkley had alleged sufficient physical injury to survive section 1997e(e). Because we find the administrative exhaustion issue dispositive, we treat these two classes of plaintiffs together. If section 1997e(a) precludes the filing of these plaintiffs' claims until after they have exhausted their administrative remedies, then the district court's "holding" concerning the applicability of section 1997e(e) is merely unnecessary dicta.

futile or inadequate." *Id.* at 1325-26. Plaintiffs' argument in effect asks us either to reconsider *Alexander* or to limit the case to its facts. We are unable to reconsider *Alexander* because only the court sitting *en banc* has the authority to overrule circuit precedent. We decline to limit the case to its facts because we find the general principles of *Alexander* persuasive. For the reasons stated therein, we reaffirm that section 1997e(a) imposes a mandatory requirement on prisoners seeking judicial relief to exhaust their administrative remedies first. Further, we reaffirm that the term "available" as used in section 1997e(a) does not mean that prison inmates must only exhaust their administrative remedies if the relief they seek is "available" within the administrative apparatus; instead, the term means that a prisoner must exhaust all administrative remedies that are available before filing suit, regardless of their adequacy. *See id.; see also, Perez v. Wisconsin Dep't of Corrections,* 182 F.3d 532, 536-37 (7th Cir.1999) (concurring with *Alexander* on the issue of "available" remedies).

C.

Even though plaintiff James Wade was still in prison and had exhausted all of his administrative remedies, the district court also dismissed with prejudice Wade's claims to compensatory and punitive damages because his allegations of physical injury were not serious enough to satisfy the physical injury requirement of section 1997e(e). Wade alleged that members of the GDC "Tactical Squad" subjected him to a body cavity search while female staff were present, and also forced him to "dry shave." The issue on this appeal is whether the "dry shave" allegation, standing alone, depicts an injury serious enough to meet the section 1997e(e) requirement of physical injury.

Section 1997e(e) does not define "physical injury." Wade asks us to interpret this part of the statute to mean that

any allegation of physical injury is sufficient, including physical manifestations of purely mental or emotional injury. But we think such an interpretation would undermine the statute's essential purpose—"to curtail frivolous and abusive prisoner litigation." *Alexander*, 159 F.3d at 1324. Congress was clearly trying to preclude some part of the litigation routinely pursued by prison inmates from being brought, and Wade's reading of the statute would almost render the congressional exclusion an empty set. Further, allowing prisoners to surmount this new statutory hurdle with purely trivial allegations of physical injury would make no sense in light of our basic understanding that "routine discomfort is part of the penalty that criminal offenders pay for their offenses against society." *Hudson v. McMillian*, 503 U.S. 1, 9, 112 S.Ct. 995, 1000, 117 L.Ed.2d 156 (1992) (citation and internal quotation marks omitted).

We therefore join the Fifth Circuit in fusing the physical injury analysis under section 1997e(e) with the framework set out by the Supreme Court in *Hudson* for analyzing claims brought under the Eighth Amendment for cruel and unusual punishment, and hold that in order to satisfy section 1997e(e) the physical injury must be more than de minimis, but need not be significant.[7] *Gomez v. Chandler*, 163 F.3d 921, 924 (5th Cir.1999). We do so, however, with the understanding that our holding today does not affect our Eighth Amendment jurisprudence, but only uses the well established Eighth Amendment standards to guide us in our section 1997e(e) analysis. The Fifth Circuit has concluded, even after *Hudson*, that in order "to support an Eighth Amendment

---

[7]We do not resolve the question whether de minimis uses of physical force might satisfy section 1997e(e) if they are of the sort "repugnant to the conscience of mankind," *Hudson*, 503 U.S. at 10, 112 S.Ct. at 1000, (citation and internal quotation marks omitted), because we find that on this record the question is not presented. Wade's forced "dry shave" is not the sort of physical force "repugnant to the conscience of mankind."

excessive force claim a prisoner must have suffered from the excessive force a more than de minimis *physical* injury." *Gomez,* 163 F.3d at 924 (emphasis added). In light of the *Hudson* Court's rather fluid approach to what can constitute a cognizable injury under the Eighth Amendment, *see Hudson,* 503 U.S. at 9, 112 S.Ct. at 1000 (malicious and sadistic use of force is violative "whether or not significant injury is evident"), we have never held that a prisoner must allege a *physical* injury in order to make out a cognizable claim under the Eighth Amendment. Indeed, some of our cases suggest the contrary. *See, e.g., Campbell v. Sikes,* 169 F.3d 1353, 1375 (11th Cir.1999) (extent of the injury is one of the "factors" used in determining whether use of force was malicious and sadistic). We express no view on the issue today, and hold only that a prisoner must allege more than a de minimis physical injury in order to satisfy the requirement of section 1997e(e).

Viewing the allegations in the light most favorable to plaintiff, we conclude that Wade has not alleged a physical injury that is more than de minimis. A "dry shave," without more, is simply not the kind of "injury" that is cognizable under section 1997e(e). *Cf. Shabazz v. Barnauskas,* 790 F.2d 1536, 1538 (11th Cir.1986) (dismissing plaintiff's Eighth Amendment cruel and unusual punishment claim because allegation of forced shave was de minimis, even though the shaving caused "bleeding, inflammation, irritation, ingrowing of hairs, infection, purulence and pain"), *cert. denied,* 479 U.S. 1011, 107 S.Ct. 655, 93 L.Ed.2d 709 (1986). Were we to hold that this single allegation is sufficient to satisfy the statutory requirement of physical injury, we would surely sap the congressional scheme of its essential purpose and vitality.

D.

Because we find that Wade's injuries are not sufficient to meet the physical injury requirement of section 1997e(e), we

must decide whether the statute is constitutional as applied to bar his claims for compensatory and punitive damages in this case.

1.

Wade argues that the statutory bar to claims not involving physical injury amounts to a denial of due process under the Fifth Amendment. Courts and commentators have approached the issue of whether Congress can tailor jurisdiction so as to preclude all effective remedies for a claimed constitutional violation with so much dodging and trepidation that the D.C. Circuit has been led to write that "it has become something of a time-honored tradition for the Supreme Court and lower federal courts to find that Congress did not intend to preclude altogether judicial review of constitutional claims in light of the serious due process concerns that such preclusion would raise." *Bartlett v. Bowen*, 816 F.2d 695, 699 (D.C.Cir.1987). And we think that if section 1997e(e) actually precluded *all* effective judicial review, the statute would raise constitutional questions that would be, at the very least, troublesome. Because we find that the statute is best read as only a limitation on a damages remedy, however, we need not address the vexing jurisdictional questions today.

At the outset, we assume that section 1997e(e)'s bar to claims "for mental or emotional injury suffered while in custody without a prior showing of physical injury" actually operates to preclude some claims of a constitutional dimension that a prisoner might have been able to bring before the PLRA was enacted. Section 1997e(e) refers to claims for injuries "suffered." Use of the past tense indicates that the provision constitutes a limitation on a damages remedy only, and does not impair a prisoner's right to seek declaratory and injunctive relief

for constitutional violations.[8] An action at law for money damages is the assumed remedy for a violation of legal rights that has occurred in the past, whereas the threat of imminent future harm can only be cured by an equitable remedy. Thus, Congress could not have meant to preclude claims for declaratory and injunctive relief under the PLRA because such relief addresses a violation the prisoner has not yet "suffered." The harm will be suffered, if at all, in the future. No injury is required in a pleading for prospective equitable relief; only a threat of future injury is necessary. We therefore join the other circuits who have considered the issue in holding that section 1997e(e) only precludes some actions for money damages, and does not materially thwart actions for declaratory and injunctive relief.[9] *See Harper v. Showers,* 174 F.3d 716, 719 (5th Cir.1999); *Perkins v. Kansas Dep't of Corrections,* 165 F.3d 803, 808 (10th Cir.1999); *Davis v. District of Columbia,* 158 F.3d 1342, 1346 (D.C.Cir.1998); *Zehner v. Trigg,* 133 F.3d 459, 462 (7th Cir.1997).

Read as a limitation on recovery only, the provision presents no constitutional infirmity that would offend the Due Process Clause of the Fifth Amendment. Despite Wade's ringing invocation of *Marbury v. Madison,* that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," 5 U.S. (1 Cranch) 137, 162, 2 L.Ed. 60 (1803), this case is not about a denial of the law's protection.

---

[8]This conclusion is further bolstered by the fact that the statutory provision is entitled, "Limitation on recovery."

[9]We express no view on whether section 1997e(e) would bar an action for nominal damages that are normally available for the violation of certain "absolute" constitutional rights, without any showing of actual injury. *See Carey v. Piphus,* 435 U.S. 247, 266, 98 S.Ct. 1042, 1054, 55 L.Ed.2d 252 (1978). Plaintiffs have not sought nominal damages in this case, and so we do not address the issue.

What this issue boils down to is whether or not the Constitution of the United States mandates a tort damages remedy for every claimed constitutional violation; and the answer is certainly that it does not. In both *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983) and *Schweiker v. Chilicky*, 487 U.S. 412, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988), as the D.C. Circuit has observed, the Supreme Court declined to infer a *Bivens*[10] remedy for constitutional violations where Congress had provided an alternative remedial scheme, even though Congress had failed to provide for complete relief. *Davis*, 158 F.3d at 1346-47. *Schweiker* is particularly instructive because the Court held that there was no *Bivens* remedy for people who had allegedly been denied due process in applying for Social Security disability benefits, even though this meant that they would have no "remedy in damages for emotional distress." 487 U.S. at 425, 108 S.Ct. at 2468. And in the military context, the Court has been even more blatant in insisting that not every constitutional deprivation can give rise to an action for damages. *See Chappell v. Wallace*, 462 U.S. 296, 304-05, 103 S.Ct. 2362, 2368 76 L.Ed.2d 586 (1983) (no *Bivens* remedy for Navy plaintiffs alleging racial discrimination); *United States v. Stanley*, 483 U.S. 669, 683-84, 107 S.Ct. 3054, 3064, 97 L.Ed.2d 550 (1987) (no *Bivens* remedy for plaintiff suing the military for injuries resulting from the administration to him of the drug LSD, without his consent, as part of an army experiment).[11]

---

[10] *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (inferring a tort damages action for violations of plaintiff's Fourth Amendment rights).

[11] Additionally, in the section 1983 context, the Seventh Circuit has observed that "Congress itself created the § 1983 damages remedy.... The Supreme Court has never held that this remedy is constitutionally required, and it would be odd to conclude that Congress may not take away by statute what it has given by statute." *Zehner*, 133 F.3d at 461-62.

Whatever our ultimate resolution of Congress' power to restrict judicial enforcement of federal rights, it is clear that Congress has wide latitude to decide how violations of those rights shall be remedied.[12] In this case, Congress has chosen to enforce prisoners' constitutional rights through suits for declaratory and injunctive relief, and not through actions for damages. It is true that practical application of the congressional scheme will mean that some plaintiffs will be without any relief. *See Zehner,* 133 F.3d at 462-63 (plaintiffs cannot be compensated at all for their fear that they may have been exposed to asbestos in the past). But "the Constitution does not demand an individually effective remedy for every constitutional violation." *Id.* If it did, we would have to rule unconstitutional our doctrines of absolute and qualified immunity. We therefore join the Seventh and D.C. Circuits in

---

It is true that in some limited areas the Supreme Court has been more insistent that a damages remedy be provided. In the context of the Fifth Amendment's Takings Clause, the Court has recognized a constitutional obligation to provide a monetary remedy for a governmental appropriation because "it is the Constitution that dictates the remedy for interference with property rights amounting to a taking." *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 316 n. 9, 107 S.Ct. 2378, 2386 n. 9, 96 L.Ed.2d 250 (1987). And with some qualifications, there appears to be a due process obligation on the part of states to provide a refund remedy for taxes unconstitutionally exacted, where there is no adequate prepayment remedy. *See Reich v. Collins,* 513 U.S. 106, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994); *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco,* 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990). To argue that these cases establish some general right to a damages remedy for every claimed constitutional violation, however, is to sweep too broadly. Damages were required in those cases because a compensatory remedy was particularly related to the constitutional violation.

[12]*See* Henry Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 *Harv. L.Rev.* 1362, 1366 (1953) ("It must be plain that Congress necessarily has a wide choice in the selection of remedies, and that a complaint about action of this kind can rarely be of constitutional dimension.").

concluding that Congress has left open avenues of declaratory and injunctive relief that are ample for constitutional purposes, and hold that section 1997e(e) does not violate the Due Process Clause of the Fifth Amendment. *See Davis,* 158 F.3d at 1346; *Zehner,* 133 F.3d at 462-63.

2.

Wade also argues that section 1997e(e) violates the Equal Protection component of the Due Process Clause of the Fifth Amendment.[13] Classifications that disadvantage a suspect class or impinge upon the exercise of a fundamental right are subject to strict scrutiny, while classifications that do neither are subject only to review for rationality. *Plyler v. Doe,* 457 U.S. 202, 216-17, 102 S.Ct. 2382, 2394-95, 72 L.Ed.2d 786 (1982). Wade argues that section 1997e(e) impinges on his fundamental right to access the courts.

Wade's argument is similar to his first attack, but it comes dressed in Equal Protection clothing. Prison inmates do have a constitutional right of access—they must be afforded "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to a court." *Lewis v. Casey,* 518 U.S. 343, 351, 116 S.Ct. 2174, 2180, 135 L.Ed.2d 606 (1996). As discussed in the context of Wade's due process argument, section 1997e(e) does not affect prisoners' right of judicial access. It only affects the *remedies* inmates may seek. Prisoners still retain a "reasonably adequate opportunity" to seek relief from constitutional violations that do not involve physical injury, because they may still file suits for declaratory and injunctive relief. They simply may not recover monetary

---

[13]Federal legislation is subject to analysis under the equal protection component of the Fifth Amendment's Due Process Clause. *Adarand Constrs., Inc. v. Pena,* 515 U.S. 200, 213, 115 S.Ct. 2097, 2105-06, 132 L.Ed.2d 158 (1995).

damages for such claims. *See Davis,* 158 F.3d at 1347; *Zehner,* 133 F.3d at 463.

Because section 1997e(e) neither disadvantages a suspect class nor impinges on a fundamental right, we review the provision only for rationality. *Plyler,* 457 U.S. at 216-217, 102 S.Ct. at 2394-95. Under this lenient standard of review, section 1997e(e) easily passes muster. Congress' stated purpose to limit frivolous lawsuits by those who face uniquely low opportunity costs for pursuing litigation rationally supports its action in adopting the measure. Wade's reliance on *Romer v. Evans,* 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) is misplaced. In that case, the Supreme Court struck down a Colorado constitutional provision that targeted gays and lesbians and denied them political redress "across the board," *id.* at 633-34, 116 S.Ct. at 1628-29, because there was *no* rationale for the provision other than animus against a politically unpopular group. In this case, Congress' much more narrow restriction on the right of prisoners to obtain certain forms of relief, coupled with a rationale that does not reduce to mere animus against prisoners, convince us that the section 1997e(e) easily passes rationality review.[14]

---

[14]Plaintiffs make a somewhat bizarre separation of powers argument involving *United States v. Klein,* 80 U.S. (13 Wall.) 128, 20 L.Ed. 519 (1871), and *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). *Klein* was a unique case in which the Court struck down a congressional attempt to prescribe a "rule of decision" in particular cases. Plaintiffs argue that here, too, Congress is trying to prescribe a "rule of decision" by precluding some actions for compensatory and punitive damages. But plaintiffs' argument sweeps far too broadly. Taken to its logical conclusion, the argument would invalidate almost any congressional alteration of judge-made common law. Congress can certainly "intrude" upon the judicial province and prescribe a "rule of decision" by simply amending the governing law. *See Robertson v. Seattle Audubon Soc'y,* 503 U.S. 429, 440, 112 S.Ct. 1407, 1414, 118 L.Ed.2d 73 (1992). And that is just what Congress has done here. In *City of Boerne,* the Court struck down the Religious Freedom Restoration Act because Congress had exceeded its

IV.

For the forgoing reasons, we AFFIRM the district court's ruling with respect to plaintiffs Locklear, Kilgore, Langes, and Brinkley. We also AFFIRM the district court's dismissal of plaintiff Wade's claims for compensatory and punitive damages, but REMAND with instructions that the district court consider Wade's claims for declaratory and injunctive relief. We VACATE the district court's dismissal of claims for compensatory and punitive damages for plaintiffs Chadwick, Harris, Cook, Hooks, Nation, and Dailey, and REMAND for further proceedings consistent with this opinion.

SO ORDERED.

Fourteenth Amendment power to make laws for the enforcement of the Free Exercise Clause of the First Amendment. In order to find the analogy between that case and this one sound, we would have to hold that Congress is without the constitutional power to structure remedies for claimed constitutional violations. We have already traveled that road in this and the preceding section, and we found the argument to be without merit.

APPENDIX 3:

Harris v. Garner, Civil Action No. 98-8899
(entered June 24, 1998)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

FREDERICK HARRIS, et al.,	:	
Plaintiffs,	:	
v.	:	Civil Action No.
WAYNE GARNER, et al.,	:	5:97-cv-79-4(HL)
Defendants.	:	

ORDER

(Filed Jun. 24, 1998)

The order and Recommendation of United States Magistrate Judge Claude W. Hicks, Jr., entered on March 11, 1998 in the above-captioned matter [Tab 27] is before the Court. The Magistrate Judge recommends that Defendants' Motion to Dismiss be granted. Plaintiffs have filed written objections to the Recommendation, as permitted by 28 U.S.C. § 636(b)(1). The Recommendation, and the objections thereto, having been carefully considered, the Recommendation is hereby accepted, with the following modification.

In Section IV.E. of Plaintiffs' objections, Plaintiffs contend that the Magistrate Judge erred in concluding that Plaintiff James Wade had not exhausted all of his available administrative remedies and, therefore, further erred in concluding that Wade's claims should be dismissed

pursuant to 42 U.S.C. § 1997e(a). Review of the documents submitted by the parties shows that Wade submitted a grievance on October 28, 1996 in which he challenged the behavior of the tactical squad toward him on October 23, 1996, including the incident in which he was forced to dry shave. On November 14, 1996, the Warden provided a response to Wade's grievance, but did not specifically address the dry shaving incident in the response. Wade filed a timely appeal from the Warden's response, although the basis for the appeal given by Wade did not specifically refer to the dry shave incident. In the Motion to Dismiss, Defendants argued that by not specifically mentioning the dry shave incident in the appeal, Wade had failed to exhaust his administrative remedies as to that claim. Apparently agreeing with Defendants, the Magistrate Judge dismissed Wade's claim without prejudice for failing to exhaust all of his claims.

In their objections, Plaintiffs contend that since the Warden's response did not address the dry shave incident, Wade had no official response to challenge as to that incident on appeal and, therefore, the Magistrate Judge erred in dismissing his claims on the basis of failure to exhaust administrative remedies. The Court agrees with Plaintiffs' contention as to Wade's claims; however, Wade's claims are nevertheless subject to dismissal. As discussed in the Magistrate Judge's Recommendation, 42 U.S.C. § 1997e(e) requires a "prior showing of physical injury" before a Federal civil action may be brought by a prisoner for mental or emotional injury. Here, Wade's allegations of physical injury are that he was forced to strip naked, forced to press his nose against the wall, and forced to dry shave while in this condition.

While the physical aspects of these activities were no doubt unpleasant, they do not give rise to a physical injury sufficient to sustain a claim under § 1983.

In order to raise a valid Eighth Amendment claim for excessive use of force, a plaintiff must demonstrate that he has sustained more than *de minimis* physical injury. *Hudson v. McMillian*, 503 U.S. 1, 10 (1992). Likewise the showing of physical injury required to support a claim for emotional or mental suffering, as required by 42 U.S.C. § 1997e(e), must be more than *de minimis*. *Siglar v. Hightower*, 112 F.3d 191, 193-94 (5th Cir. 1997). Here, the only physical injury alleged by Wade is that he was forced to dry shave. The Court finds that being forced to dry shave is not the type of physical injury which would support a claim for emotional or mental suffering. Accordingly, Wade is prohibited from bringing a civil action for mental or emotional injury and his claim is therefore **DISMISSED with prejudice.**

SO ORDERED, this the 23 day of June, 1998.

/s/ Hugh Lawson
HUGH LAWSON, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

FREDERICK HARRIS, et al.,	:	
Plaintiffs,	:	*C.A. NO. 5:97-CV-79-4(HL)*
v.	:	*Civil Order File Volume 72,*
WAYNE GARNER, et al.,	:	*Page 7165*
Defendants.	:	

JUDGMENT

(Filed Jun. 24, 1998)

Pursuant to the Order of this Court filed June 24, 1998, having accepted the recommendation of the United States Magistrate Judge, JUDGMENT is hereby entered dismissing this action.

This 24th day of June, 1998.

GREGORY J. LEONARD, CLERK

/s/ Amy N. Sanders
Amy N. Sanders,
Deputy Clerk

APPENDIX 4:

Recommendation of Magistrate, Harris v. Garner,
Civil Action No. 98-8899
(entered March 11, 1998)

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

FREDERICK HARRIS, ET AL.,	:	**Filed March 11, 1998**
	:	**No. 5:97-CV-79-4(HL)**
Plaintiffs	:	
	:	**Proceedings Under 42**
VS.	:	**U.S.C. § 1983 Before the**
WAYNE GARNER, ET AL.,	:	**U.S. Magistrate Judge**
Defendants	:	
	:	

ORDER AND RECOMMENDATION

Presently pending before the court are several motions including the defendants' motion to dismiss, the defendants' motion to exceed page limitation, and the plaintiffs' motion to withdraw the injunctive claims of six of their number who have been released.[1] The defendants' motion to exceed page limitation is hereby **GRANTED**. The recommended Disposition of the defendants' motion to dismiss follows.[2]

---

[1] The following plaintiffs have been released from prison: HARRIS, CHADWICK, COOK, HOOKS, NATION, and DAILEY. Their claims for injunctive relief are now moot. *See McKinnon v. Talladega County*, 745 F.2d 1360, 1363 (11th Cir. 1984).

[2] For a motion to dismiss to be granted, plaintiffs' complaint, which must factually be accepted as true, must evidence that there is no set of facts entitling them to relief. *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1539 (11th Cir. 1991); *see also Luckey v. Harris*, 860 F.2d 1012, 1016-17 (11th Cir. 1988) and *Jackam v. Hospital Corp. of Am. Mideast, Ltd.*, 800 F.2d 1577, 1579 (11th Cir. 1986).

On March 10, 1997, the plaintiffs, FREDERICK HARRIS, DANNY CHADWICK, LENOIS COOK, WILLIE HOOKS, ALAN KILGORE, LEROY LANGES, FARRELL NATION, JAMES WADE, DAYTON BRINKLEY, WILLIAM DAILEY, and SAMUEL LOCKLEAR, all state prisoners, filed a complaint with this court. In their complaint, the plaintiffs alleged that the defendants, WAYNE GARNER, A. G. THOMAS, DUKE BLACKBURN, and twenty-two unnamed tactical squad officers, violated their constitutional rights during a prison "shakedown" that occurred on October 23, 1996 at Dooly State Prison. The gist of the plaintiffs' claims is that on this date, they were forced to leave their cells by tactical squad officers. The plaintiffs contend that were forced to strip, undergo body cavity searches, and stand naked, while women were present, during the search of their cells.[3] The plaintiffs contend that defendants GARNER, THOMAS, and BLACKBURN violated their constitutional rights by watching the events during the shakedown and doing nothing to stop them. They also contend that these defendants violated their constitutional rights by failing to properly instruct, supervise, control or discipline the tactical squad members who conducted the shakedown.[4]

---

[3] Plaintiff BRINKLEY also alleges that he was slapped twice and hit in the back with an officer's fist. Plaintiff HOOKS alleges that he was yanked by his shirt collar and pulled outside. Plaintiff WADE alleges that he was forced to "dry shave," causing him "substantial pain and injury." Plaintiff DAILEY alleges that he was shoved backwards. Plaintiff LOCKLEAR alleges that he was forced to tap dance naked for about a minute.

[4] "Shakedown" refers to a procedure whereby prison officials search for contraband on prisoners and in their cells.

The defendants have previously moved for dismissal of this action on the grounds that the plaintiffs, in contravention of the Prison Litigation Reform Act, failed to exhaust administrative remedies prior to filing this action and seek damages for emotional or mental injury, without a prior showing of physical injury. The plaintiffs, through counsel, have filed a response to the defendants' motion and the defendants have filed a timely reply to this response.

1. Exhaustion Requirement

Under the Prison Litigation Reform Act,[5] "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

In their response to the defendants' motion to dismiss, the plaintiffs do not argue the defendants' point of whether or not they have individually exhausted their claims. Instead, they contend that this is not a prison conditions case so the exhaustion requirement is not applicable. The plaintiffs also contend that the PLRA does not require each plaintiff in a multi-plaintiff case to exhaust. The plaintiffs argue that the policies underlying the exhaustion requirement have been satisfied since the Department of Corrections has had the opportunity to act

---

[5] "[I]t is clear to us that Congress promulgated the PLRA to curtail prisoner tort, civil rights and conditions litigation. . . . " *Anderson v. Singletary*, 111 F.3d 801, 805 (11th Cir. 1997).

on their allegations. Finally, the plaintiffs contend that exhaustion should not be required because the administrative process that was available to them did not allow for compensatory or punitive damages, remedies they seek in this action.[6]

The undersigned finds the plaintiffs' prison conditions arguments to be unpersuasive. Congress has provided a broad definition of the term "prison conditions" and it encompasses the plaintiffs' allegations in this case.[7]

The undersigned is similarly unimpressed with the plaintiffs' argument that only some of them should be required to exhaust their claims since they are proceeding as a group. There is nothing in the language of the PLRA or in its legislative history to support the plaintiffs' argument. Furthermore, it defies common sense to believe that prisoners should be able to circumvent the exhaustion requirement of the PLRA simply by proceeding in "piggyback" fashion, particularly in a situation such as

---

[6] In *McCarthy v. Madigan*, 503 U.S. 140, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992), the Supreme Court indicated that exhaustion is not required where monetary relief alone was sought and the administrative process could not provide such relief.

[7] "[I]n the PLRA, Congress also amended 18 U.S.C. § 3626 and in doing so defined the term 'civil action with respect to prison conditions' as 'any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.' " *Lacey v. C.S.P. Solano Medical Staff*, 1997 WL 819927, *9 n.6 (E.D. Cal.). *See also Morgan v. Arizona Dept. of Corrections*, 976 F.Supp. 892, 895-96 (D. Ariz. 1997).

this where some of their contentions are similar but some are not.

As for the plaintiffs' contentions concerning the availability of monetary relief through the administrative process, in this case they sought injunctive and monetary relief. The Eleventh Circuit has indicated that mixed claims such as these must be administratively exhausted prior to filing a civil action. *See Caraballo-Sandoval v. Honstead*, 35 F.3d 521, 524 (11th Cir. 1994). *See also Irwin v. Hawk*, 40 F.3d 347, 348-49 (11th Cir. 1994); *Arvie v. Stadler*, 53 F.3d 702, 706 (5th Cir. 1995).[8]

2. Absence of Physical Injuries

In their motion to dismiss, the defendants also argue that this action must be dismissed because the plaintiffs have failed to allege any physical injuries and, instead, claim mental or emotional injuries. The defendants note that under the Prison Litigation Reform Act, "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e).

In their response to the defendants' motion, the plaintiffs argue that the PLRA does not require each plaintiff in a multi-plaintiff case to allege physical injury. They also argue that the PLRA only requires physical injury for claims including mental or emotional injury as a requisite element. Finally, the plaintiffs argue that

---

[8] *See also Greene v. Meese*, 875 F.2d 639, 641 (7th Cir. 1989) (rejecting prisoner's futility argument).

application of § 1997e(e), so as to impair the availability of monetary relief for their claims, is unconstitutional.

The plaintiffs' "piggyback" assertions have previously been found to be without merit. The plaintiffs' other contentions in relation to § 1997e(e) have essentially been addressed by the Seventh Circuit in the well reasoned opinion of *Zehner v. Trigg*, 1997 WL 804799 (7th Cir.). *See also Zehner v. Trigg*, 952 F.Supp. 1318 (S.D. Ind. 1997). The undersigned adopts the reasoning of the district court and the Seventh Circuit in *Zehner* and finds that the plaintiffs' contentions regarding the operations and constitutionality of 42 U.S.C. § 1997e(e) are without merit.[9]

3. Conclusion

In sum, in light of the above, it appears that plaintiffs CHADWICK, HARRIS, COOK, HOOKS, NATION and DAILEY should have their claims dismissed, with prejudice. These plaintiffs cannot obtain monetary relief because they alleged only mental or emotional injuries and their injunctive claims are moot since they have been released from prison.

Plaintiffs LOCKLEAR, KILGORE, and LANGES should have their claims dismissed, without prejudice. These plaintiffs cannot recover monetary relief because they alleged only mental or emotional injuries. However,

---

[9] *Zehner* provides that § 1997e(e) is applicable to the claims of prisoners who have been released. *See also Kerr v. Puckett*, 967 F.Supp. 354, 361-62 (E.D. Wisc. 1997).

they are still in prison and could obtain injunctive relief, though they must first exhaust administrative remedies.

Plaintiff BRINKLEY has arguably alleged sufficient physical injuries to enable him to seek monetary relief. However, he is still in prison and has apparently not exhausted his mixed claims for damages and injunctive relief. His claims should be dismissed, without prejudice.

Plaintiff WADE has not exhausted all of his claims. He is still in prison and his dismissal should be without prejudice.

Accordingly, in light of the above, the undersigned recommends that the defendants' motion to dismiss be **GRANTED**, to the extent delineated above. Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this **RECOMMENDATION** with the district judge to whom this case is assigned, **WITHIN TEN (10) DAYS** after being served with a copy thereof.

SO ORDERED AND RECOMMENDED, this 11th day of March, 1998.

/s/ Claude W. Hicks, Jr.
CLAUDE W. HICKS, JR.
UNITED STATES
MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
OCT 26 2000
OFFICE OF THE CLERK

(2)

No. 00-484

In The

Supreme Court of the United States

FREDERICK HARRIS, ET AL.,

Petitioners,

v.

WAYNE GARNER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Eleventh Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS

THURBERT E. BAKER
Attorney General

KATHLEEN PACIOUS
Deputy Attorney General

JOHN C. JONES
Senior Assistant
Attorney General

Attorneys for Respondents

Please serve:
JOHN C. JONES
Counsel of Record
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
404-463-8850

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14pp

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals correctly concluded that a prisoner must exhaust his administrative remedies prior to initiating litigation, as dictated by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a)?

2. Whether this Court should grant certiorari on the issue of due process as it is applied to the exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) when the issue was not addressed by the courts below?

3. Whether this Court should grant certiorari to determine if allegations of abuse of prisoners falls within Congress' broad definition of "conditions of confinement," where that issue was not addressed by the courts below?

4. Whether Congress has the authority to limit claims for monetary damages in actions brought under 42 U.S.C. § 1983 where a prisoner has alleged a *de minimus* injury and may receive injunctive relief?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 1

REASONS FOR NOT GRANTING THE WRIT 3

I. The Eleventh Circuit Court of Appeals correctly concluded that a prisoner must exhaust his administrative remedies prior to initiating litigation, as dictated by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) 3

II. This Court should deny certiorari on the issue of due process as it is applied to the exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) as the issue was not addressed by the courts below 6

III. This Court should deny certiorari to determine if allegations of abuse of prisoners falls within Congress' broad definition of "conditions of confinement," because that issue was not addressed by the courts below 7

IV. Congress has the authority to limit claims for monetary damages in actions brought under 42 U.S.C. § 1983 where a prisoner has alleged a *de minimus* injury and may receive injunctive relief 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Davis v. District of Columbia, 158 F.3d 1342 (D.C. Cir. 1998) 8

Hallstrom v. Tillamook County, 493 U.S. 20 (1989)..... 5

Harper v. Jenkin, 179 F.3d 1311 (11th Cir. 1999) 5

Harper v. Showers, 174 F.3d 716 (5th Cir. 1999)..... 8

Hudson v. McMillian, 503 U.S. 1 (1992) 9

McNeil v. United States, 508 U.S. 106 (1980)..... 5

Perez v. Wisconsin Department of Corrections, 182 F.3d 532 (7th Cir. 1999)..... 5

Perkins v. Kansas City Department of Corrections, 165 F.3d 803 (10th Cir. 1999)..... 8

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992)..... 6

United States v. Atkinson, 297 U.S. 157 (1936) 6

Youakim v. Miller, 425 U.S. 231 (1976) 6

Zehner v. Trigg, 133 F.3d 459 (7th Cir. 1997) 8, 9

FEDERAL STATUTES

42 U.S.C. § 1983..... 8

42 U.S.C. § 1997.....1, 3, 4, 6, 7, 8

STATEMENT OF THE CASE

Plaintiffs filed the instant action on March 3, 1997 while they were prisoners within the custody of the Georgia Department of Corrections. Defendants filed a motion to dismiss based upon the prisoners' failure to exhaust their administrative remedies and based upon the prisoners' failure to allege an injury in fact as required under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a). The district court granted defendants' motion in its entirety. Plaintiffs appealed the ruling of the district court to the Eleventh Circuit Court of Appeals.

The Court of Appeals affirmed the district court in part and reversed in part. All parties moved for *en banc* consideration. The Court of Appeals granted the parties *en banc* review vacating the decision of the panel. The Eleventh Circuit Court of Appeals sitting *en banc*, affirmed the ruling of the district court in its entirety, reversing the panel in part. Plaintiffs now seek a Writ of Certiorari to this Court in seeking to overturn the *en banc* ruling of the Eleventh Circuit Court of Appeals.

STATEMENT OF THE FACTS

Plaintiffs' complaint alleges that twenty-two tactical squad officers verbally and physically abused them, and subjected each of them to a strip search during a "shakedown" (a systemic search) authorized and directed by Defendant officials at Dooly State Prison on October 23, 1996.

The following inmates, who are named Plaintiffs in the above-referenced case, did not file grievances concerning the shakedown at Dooly: Samuel Locklear; Alan Kilgore; Leroy Langes; Farrell Nation; Daytron Brinkley; and William Dailey. They now claim that they were humiliated and verbally abused.

Plaintiff Danny Chadwick filed a grievance complaining only that he was subjected to a strip search in the presence of women. This grievance was denied. Chadwick did not appeal the denial of this grievance.

Plaintiff James Wade filed a grievance complaining that he was subjected to a strip search in the presence of women and that he was forced to "dry shave." This grievance was denied and Wade appealed. However, Wade did not raise the issue of the alleged "dry shave" on appeal but still asserts this claim in the case at bar.

Plaintiff Frederick Harris filed a grievance complaining only that he was subjected to a strip search in the presence of women. He did not grieve any other matter regarding the shakedown of October 23, 1996. This grievance was denied and Harris appealed. Harris does not allege anywhere in the Complaint that he suffered any physical injury.

Plaintiff Lenois Cook filed a grievance complaining that he was subjected to a strip search in the presence of women and that his watch was broken during the shakedown. This grievance was denied and Cook appealed. Cook does not allege anywhere in the Complaint that he suffered any physical injury.

Plaintiff Willie Hooks filed a grievance complaining that he was subjected to a strip search in the presence of women, that officers used excessive force in removing him from his cell and that the officers verbally abused him. This grievance was denied and Hooks appealed. However, Hooks did not mention the alleged excessive force or verbal abuse on appeal. Moreover, Hooks does not allege in the Complaint that he suffered any physical injury.

According to Plaintiffs' counsel all but three of them have been released from prison since the time this lawsuit was originally filed.

REASONS FOR NOT GRANTING THE WRIT

I. The Eleventh Circuit Court of Appeals correctly concluded that a prisoner must exhaust his administrative remedies prior to initiating litigation, as dictated by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a).

Petitioners allege that since the remedies sought may not have been available or granted through the administrative process available at the institution, they should not have been required to exhaust their administrative remedies prior to filing the lawsuit. Petitioners further argue that despite the fact that all were prisoners at the time the lawsuit was filed, and thus could have exhausted their administrative remedies prior to initiating litigation, that once released, the Prison Litigation Reform Act (hereinafter "Act") should not apply. Petitioners are simply incorrect.

The Act is clear when it states, "No federal civil action *may be brought* by a prisoner confined . . . until such remedies as are available are exhausted." 42 U.S.C. § 1997e(e) (emphasis supplied). There is no provision delineating which specific remedies may be sought nor is there an exclusion for a change of status concerning confinement during or at the conclusion of the litigation. The Act simply states that if a person is a prisoner *when he files a lawsuit,* he cannot bring the claim until his administrative remedies have been exhausted.

Petitioners also refuse to recognize the purpose of the Act. Yet, Congressional intent is clear: the purpose of the Act is to discourage prisoners with nothing but time on their hands from filing frivolous litigation. This purpose makes the plain reading of the statute that much clearer. As the *en banc* court states, "the courts must presume that a legislature says in a statute what it means and means what it says." (Appendix to Petitioners' brief p. 3). When the legislature stated that "no action may be brought" absent the exhaustion of the available administrative remedies that is what it meant. There is nothing in the legislative history to indicate that some other interpretation should be made. Because the language is clear, the Court cannot provide an additional interpretation of this language.

Petitioners argue that the exhaustion requirement is futile because the remedies sought by Petitioners are not available and because many of the Petitioners are no longer in custody. Petitioners also contend that many other individuals were not granted relief by the administrative process and thus conclude that they would not obtain relief either. The reality is that no one will ever

know whether Petitioners could have obtained any relief as they did not bother to file a grievance prior to initiating this action. *Perez v. Wisconsin Department of Corrections*, 182 F.3d 532 (7th Cir. 1999). Petitioners' assertions regarding any possible administrative result are nothing but speculation. As this Court observes, "negotiation may be more effective if a lawsuit is not on file." *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989); *McNeil v. United States*, 508 U.S. 106 (1980).

Under Petitioners' theory, a district court would be required to examine each complaint to assess the viability of the administrative process including the exploration of other similar grievances to determine if the result of those grievances could be viable in the action at hand. This is an absurd burden for the lower courts and flies directly in the face of the plain language of the Act.

While admittedly there is a split in the circuits involving the applicability of the Act's exhaustion requirement to claims for monetary damages, the uniqueness of the underlying circumstances in this case is unlikely to have frequent repetition. In this case, six of the petitioners were in custody at the time suit was filed but released prior to the district court's ruling on the motion to dismiss. As is pointed out in *Harper v. Jenkin*, 179 F.3d 1311 (11th Cir. 1999), if the prisoners could have demonstrated good cause for their delay in filing a grievance, then the administrative process would have been available to them. Since six of the Petitioners were prisoners when the action was brought, but were released prior to a ruling on the motion to dismiss several months later, they are unable to file a grievance even out of time.

This is a rare situation which is not subject to frequent repetition and thus Petitioners' petition should be denied.

II. This Court should deny certiorari on the issue of due process as it is applied to the exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) as the issue was not addressed by the courts below.

Petitioners admit that the Eleventh Circuit did not address the Georgia Department of Correction's requirement that grievances must be filed within five days. (Pet. Brief p. 6). Neither the panel nor the *en banc* decision of the Eleventh Circuit addressed the applicability of the due process clause to the exhaustion requirement of the Act. Since this issue was not decided by the courts below, it is not appropriate for review here.

The Court traditionally denies review of questions not decided below unless error is "obvious, or . . . seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1936). Petitioners offer no such issue. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). "These principals help to maintain the integrity of the process of certiorari." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992). There is no reason why this Court should deviate from its usual course on issues not addressed by the courts below.

III. The Court should deny certiorari to determine if allegations of abuse of prisoners falls within Congress' broad definition of "conditions of confinement," because that issue was not addressed by the courts below.

Once again Petitioners attempt to raise an issue which has not been ruled upon below. (Pet. Brief p. 17). Therefore, for the reasons discussed under the previous section, the petition should be denied.

Moreover, it should be noted that Congress very clearly defined what is meant by conditions of confinement. The Act explicitly states, "conditions of confinement" means "any civil proceeding arising under federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison." 42 U.S.C. § 1997e(a). Unless Petitioners are alleging that Respondents are not government officials, in which case any action would not have been under color of state law, or that their lives were not affected by the alleged excessive use of force, in which case they would be hard pressed to establish a constitutional violation, then these allegations are covered by the Act. Certiorari should be denied in light of such clear legislative language.

IV. Congress has the authority to limit claims for monetary damages in actions brought under 42 U.S.C. § 1983 where a prisoner has alleged a *de minimus* injury and may receive injunctive relief.

Congress created a remedy for constitutional violations committed by state actors when they passed 42 U.S.C. § 1983. There is no constitutional right to monetary relief for an alleged constitutional violation. But, what Congress gives, Congress may also take away, and Congress did take away some of the remedies available to prisoners under 42 U.S.C. § 1983 by passing the Prison Litigation Reform Act. Since 42 U.S.C. § 1983 is a congressionally created remedy, it can be limited by the very entity that created it. *Zehner v. Trigg*, 133 F.3d 459, 461-463 (7th Cir. 1997). As the Eleventh Circuit panel decision correctly states, the Petitioners are asking the Court to "rewrite § 1997e(e) [of the PLRA] by construing it not to apply to constitutional claims." (Appendix to Petitioners' brief p. 27). That Code section states, "no Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). Petitioners argue that the appellate court's interpretation of the Act has left the released Petitioners without a remedy for relief. Petitioners claim that the court's interpretation flies in the face of the Constitution. The circuit courts have consistently determined that claims for injunctive relief are still allowed where there is no showing of physical injury. *See Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999); *Perkins v. Kansas City Department of Corrections*, 165 F.3d 803, 808 (10th Cir. 1999); *Davis v. District of*

Columbia, 158 F.3d 1342, 1346 (D.C. Cir. 1998); *Zehner v. Trigg*, 133 F.3d 459 (7th Cir. 1997).

Petitioners claim that since many of them were released from custody, they are now without a legal remedy. Nonetheless, at the time the suit was filed, injunctive relief was available to all of the Petitioners. No motion for preliminary injunction was filed. For whatever reason, counsel for Petitioners failed to seek injunctive relief when it was available to them. They can not now cry foul because the only remedy available to them has slipped through their fingers.

Further, construing the statute in the manner the Petitioners propose would contradict the purpose behind the Act. As the *en banc* decision points out, the very purpose behind the Act is to curtail frivolous litigation by prisoners. Since the majority of prisoners' suits involve constitutional claims, to exclude constitutional claims from the injury requirement would effectively nullify the very purpose of the Act. (Petitioners' brief appendix p. 28).

In this case below, the Eleventh Circuit applied this Court's ruling of what would be termed a constitutional violation in a case involving excessive use of force and applied it to define the meaning of physical injury under the Act. *Hudson v. McMillian*, 503 U.S. 1 (1992). The "injury" requirement of the Act is defined as that which is more than *de minimus*. In addition to this finding, the court found that upon a plain reading of the statute, in order to maintain a federal cause of action for damages, a prisoner must show that he received a physical injury.

The ruling of the court below was correct. Therefore, the petition should be denied.

CONCLUSION

WHEREFORE, based on the foregoing, Respondents pray that this Court deny the instant Petition for Writ of Certiorari.

Respectfully submitted,

THURBERT E. BAKER 033887
Attorney General

KATHLEEN PACIOUS 558555
Deputy Attorney General

JOHN C. JONES 401250
Senior Assistant Attorney General
Counsel of Record

PLEASE ADDRESS ALL COMMUNICATIONS TO:

JOHN C. JONES
Senior Assistant Attorney General
40 Capitol Squire, S.W.
Atlanta, Georgia 30334-1300
(404) 463-8850

Supreme Court, U.S.
FILED
DEC 29 2000
CLERK

(3)

No. 00-484

In the Supreme Court of the United States

FREDERICK LAMAR HARRIS, ET AL., PETITIONERS

v.

WAYNE GARNER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Assistant Attorney General

BARBARA L. HERWIG
PETER R. MAIER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

18 pp

QUESTIONS PRESENTED

1. Whether the exhaustion provision of the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e(a) (Supp. IV 1998), required petitioners to exhaust their administrative remedies before filing suit.

2. Whether the PLRA's exhaustion requirement violates the Due Process Clause of the Fourteenth Amendment when the state grievance system requires a prisoner to file a grievance within five days of the date on which the grievance arises, but allows exceptions for good cause.

3. Whether a suit alleging excessive force by prison officials is an action brought by a prisoner "with respect to prison conditions" within the meaning of the PLRA's exhaustion requirement.

4. Whether the PLRA's requirement that no federal civil action may be brought by a prisoner for mental or emotional injury suffered while in custody without a prior showing of physical injury, 42 U.S.C. 1997e(e) (Supp. 1998), applies to constitutional claims, and if so, whether such a bar is constitutional.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	5
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Allah v. *Al-Hafeez*, 226 F.3d 247 (3d Cir. 2000)	10, 12
Booth v. *Churner*, 206 F.3d 289 (3d Cir. 2000), cert. granted, No. 99-1964 (Oct. 30, 2000)	6, 7, 14
Bush v. *Lucas*, 462 U.S. 367 (1983)	10, 11
Canell v. *Lightner*, 143 F.3d 1210 (9th Cir. 1998)	9
Carey v. *Piphus*, 435 U.S. 247 (1978)	12
Chappell v. *Wallace*, 462 U.S. 296 (1983)	11
Davis v. *District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998)	12, 13
Freeman v. *Francis*, 196 F.3d 641 (6th Cir. 1999)	7
Harper v. *Showers*, 174 F.3d 716 (5th Cir. 1999)	11
Liner v. *Goord*, 196 F.3d 132 (2d Cir. 1999)	10
Memphis Cmty. Sch. Dist. v. *Stachura*, 477 U.S. 299 (1986)	10
Metro-North Commuter R.R. v. *Buckley*, 521 U.S. 424 (1997)	13
Nussle v. *Willette*, 224 F.3d 95 (2d Cir. 2000), petition for cert. pending, No. 00-853	7
Perkins v. *Kansas Dep't of Corr.*, 165 F.3d 803 (10th Cir. 1999)	11-12
Robinson v. *Page*, 170 F.3d 747 (7th Cir. 1999)	9
Rowe v. *Shake*, 196 F.3d 778 (7th Cir. 1999)	9
Schweiker v. *Chilicky*, 487 U.S. 412 (1988)	11
Smith v. *Wade*, 461 U.S. 30 (1983)	12

Cases—Continued: Page

Taylor v. *Freeland & Kronz*, 503 U.S. 638 (1992) 6
Youakim v. *Miller*, 425 U.S. 231 (1976) 6
Zehner v. *Trig*, 133 F.3d 459 (7th Cir. 1997) 12, 13

Constitution and statutes:

U.S. Const.:
Amend. I 9
Amend. IV 2
Amend. VIII 2, 12
Amend. XIV 2
Due Process Clause 6
Prison Litigation Reform Act of 1995, 42 U.S.C. 1997a *et seq.* 2, 3, 5, 6, 7, 8
42 U.S.C. 1997e(a) (Supp. IV 1998) 2, 4, 5, 8
42 U.S.C. 1997e(e) (Supp. IV 1998) 2, 8, 12
42 U.S.C. 1983 (Supp. IV 1998) 10, 12

Miscellaneous:

Georgia Dep't of Corr., *Standard Operating Procedures*, Reference No. IIB05-0001 (Jan. 1, 1996) 7

In the Supreme Court of the United States

No. 00-484

FREDERICK LAMAR HARRIS, ET AL., PETITIONERS

v.

WAYNE GARNER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1-77) is reported at 216 F.3d 970. The panel opinion (Pet. App. 78-96) is reported at 190 F.3d 1279. The order of the district court (Pet. App. 97-99) and the order and recommendation of the magistrate judge (Pet. App. 101-107) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2000. A petition for a writ of certiorari was filed on September 25, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are current and former inmates at the Dooley Facility of the Georgia State Department of Corrections. Pet. App. 79-81. They filed suit in federal district court against state prison officials (respondents), alleging that respondents violated their rights under the Fourth, Eighth, and Fourteenth Amendments to the Constitution during a prison "shakedown." *Id.* at 79-80. In particular, petitioners alleged that prison officials performed body cavity searches when members of the opposite sex were present, physically harassed some inmates, ordered one inmate to "dry shave" with an unlubricated razor, verbally harassed one inmate concerning his perceived sexual orientation, and ordered one inmate to "tap dance" while naked. *Id.* at 80.

Respondents moved to dismiss based on the "exhaustion" and "physical injury" provisions of the Prison Litigation Reform Act of 1995 (PLRA). Pet. App. 81-82. The exhaustion provision specifies that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a) (Supp. IV 1998). The physical injury provision specifies that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. 1997e(e) (Supp. IV 1998).

Adopting in large part a magistrate judge's order and recommendation (Pet. App. 101-107), the district court granted the motion to dismiss (*id.* at 97-99). The dis-

trict court dismissed the claims of petitioners who had not exhausted their administrative remedies on the basis of the exhaustion requirement. The court rejected petitioners' contentions that their claims did not concern "prison conditions," that exhaustion by some should excuse exhaustion by others, and that claims for monetary relief need not be exhausted. *Id.* at 103-105.

Relying on the physical injury provision, the court dismissed the monetary claims of those petitioners who alleged only mental or emotional injury. Pet. App. 98-99, 105-106. The court held that the physical injury provision applies to the claims of prisoners who have been released after suit is filed. *Id.* at 106 n.9. The court also ruled that the physical injury provision is constitutional. *Id.* at 106. Finally, the court ruled that a "dry shave" does not constitute the kind of physical injury that would support a claim for mental or emotional injury. *Id.* at 99.

2. A panel of the court of appeals affirmed in part and vacated in part. Pet. App. 78-96.[1] The panel first held that the physical injury provision does not apply to persons who are released from prison before the entry of a district court's judgment. *Id.* at 83-85. The panel therefore vacated the portion of the district court's judgment dismissing the monetary claims of the petitioners who were released from prison before entry of the district court's judgment. *Ibid.*

The panel next held that the exhaustion requirement barred the claims of the petitioners who had not exhausted administrative remedies. Pet. App. 85-87. The

---

[1] The United States intervened on appeal to defend the constitutionality of the PLRA's exhaustion and physical injury provisions. The United States also participated as amicus curiae on questions concerning the construction of the exhaustion provision.

court rejected petitioners' argument that exhaustion was not required because the prison had already rejected similar claims, and because the prison's administrative procedure does not provide monetary relief. *Ibid.* Relying on prior circuit precedent, the court held that, under Section 1997e(a), "a prisoner must exhaust all administrative remedies that are available before filing suit, regardless of their adequacy." *Id.* at 87.

Finally, the court of appeals affirmed the dismissal of the claim of the petitioner who alleged that he had been ordered to "dry shave" on the ground that his claim was barred by the physical injury provision. Pet. App. 87-95. The court ruled that the physical injury provision requires proof of something "more than a de minimis physical injury," and that petitioner's "dry shave" did not cross that threshold. *Id.* at 88-89. The court also rejected petitioner's argument that the physical injury provision is unconstitutional. *Id.* at 89-95. The court held that the physical injury provision does not bar claims for injunctive or declaratory relief and that the Constitution does not mandate a damages remedy for every constitutional violation. *Id.* at 91-92.

3. The court of appeals granted rehearing en banc, and the en banc court affirmed in part and vacated in part the district court's judgment. Pet. App. 1-29. The court held that the physical injury provision barred the claims of those petitioners who were released from prison after they filed suit. *Id.* at 3-27. Relying on the plain meaning of the term "bring," the court concluded that, as long as a person is incarcerated at the time he files suit, a claim for emotional or mental injury is barred unless there is a showing of physical injury. *Ibid.* The court concluded, however, that a dismissal under the physical injury provision should be without

prejudice, allowing a person to refile a complaint after he has been released from prison. *Id.* at 18-19.

The en banc court also rejected petitioners' contention that the physical injury provision does not apply to constitutional claims. Pet. App. 27-28. The court reasoned that the plain language of the provision applies to constitutional claims and that Congress's purpose of deterring frivolous lawsuits would be thwarted if the provision did not apply to constitutional claims. *Ibid.* In all other respects, the en banc court reinstated the panel's decision. *Id.* at 3.

Judge Anderson filed a special concurrence that largely agreed with the majority's reasoning concerning the application of the physical injury provision to suits filed by inmates who are released after suit is filed. Pet. App. 29-30. Judge Tjoflat (joined by Judges Birch, Barkett, and Wilson) concurred in part and dissented in part. Judge Tjoflat concluded that a district court has discretion to permit a person who was released from prison after he filed suit to avoid the bar of the physical injury provision by supplementing his complaint with the fact that he is no longer a prisoner. *Id.* at 30-77.

DISCUSSION

1. Petitioners argue (Pet. 7) that they should not have been required to exhaust administrative remedies pursuant to the exhaustion provision of the Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(a) (Supp. IV 1998), because their prison's administrative process could not have provided them with any relief. In particular, petitioners contend (Pet. 11-13) that, since they could not comply with the prison's deadline for filing complaints, and the prison had already refused to grant any relief in other cases involving the same

incident, exhaustion of administrative remedies would have been a meaningless formality. Petitioners note that there is a conflict in the circuits concerning whether the PLRA's exhaustion provision requires a prisoner to exhaust administrative remedies when the prisoner seeks relief that cannot be provided by the existing prison administrative procedure. Pet. 8-9 (citing cases). And they urge the Court to grant review in order to resolve that conflict.

On October 30, 2000, the Court granted certiorari in *Booth* v. *Churner* (No. 99-1964), to decide whether the PLRA's exhaustion provision "requires a prisoner seeking only monetary damages to exhaust administrative remedies where monetary damages are not available under the applicable administrative process." Pet. at i, *Booth* v. *Churner*, No. 99-1964. The resolution of the question in *Booth* is likely to shed light on the question raised by petitioners. The Court should therefore hold the present petition pending its decision in *Booth*, and then dispose of the petition as appropriate in light of that decision.

2. Petitioners also argue (Pet. 14-16) that the Court should grant review to decide whether the PLRA's exhaustion requirement violates the Due Process Clause of the Fourteenth Amendment when a State's grievance procedure requires a prisoner to file a grievance within five days of the date on which the grievance arises. Petitioners, however, did not raise that issue in the court of appeals, and the court of appeals did not address it. Petitioners' due process question is therefore not properly presented here. See *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

Moreover, the question that petitioners seek to present—whether a procedure that allows only five

days for the filing of the complaint violates due process —is not presented by the state scheme at issue here. Under the Georgia procedure, "[t]he form must be filed within five (5) calendar days from the date the inmate discovered, or reasonably should have discovered, the incident giving rise to the complaint and was able to file the grievance." Georgia Dep't of Corr., *Standard Operating Procedures*, Reference No. IIB05-0001, para. V.D.6 (Jan. 1, 1996). The Grievance Coordinator, however, "may waive this time period in appropriate cases for good cause shown." *Ibid.* Because the state scheme at issue allows for the filing of complaints after the five-day period to which petitioners object, petitioners' due process question is not presented here.

3. Petitioners also seek review (Pet. 17-18) of the question whether a suit alleging excessive force by prison officials is an action "with respect to prison conditions" within the meaning of the PLRA's exhaustion provision and therefore subject to the exhaustion requirement. As petitioners note (Pet. 17-18), there is a conflict in the circuits on that issue. Compare *Booth* v. *Churner*, 206 F.3d 289, 293-294 (3d Cir. 2000) (excessive force claims are claims "with respect to prison conditions"), cert. granted, No. 99-1964 (Oct. 30, 2000), and *Freeman* v. *Francis*, 196 F.3d 641, 643-644 (6th Cir. 1999) (same), with *Nussle* v. *Willette*, 224 F.3d 95, 99-106 (2d Cir. 2000) (excessive force claims are not claims "with respect to prison conditions"), petition for cert. pending, No. 00-853. Review of that question in this case, however, is not warranted. Petitioners did not raise that issue in the court of appeals, and the court of

appeals did not address it. That question is therefore not properly presented here.[2]

4. Finally, petitioners seek review (Pet. 19-29) of the questions whether the PLRA's physical injury requirement applies to constitutional claims, and if so, whether that provision is constitutional. Those questions do not warrant review.

a. The physical injury provision specifies that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. 1997e(e) (Supp. IV 1998). That statutory text prevents a plaintiff from seeking damages for mental or emotional injury, absent a showing of physical injury, regardless of whether the mental or emotional injury arises from a constitutional violation or a violation of another legal norm. As the court of appeals succinctly explained (Pet. App. 27), "'no' means no." Moreover, as the court of appeals further emphasized (*id.* at 28), Congress added the physical injury provision in order to reduce the number of frivolous lawsuits filed by inmates and that purpose would be thwarted if the physical injury provision did not apply to constitutional claims. The court of appeals therefore correctly held that the physical injury provision bars an inmate from seeking damages for mental or emotional injury arising

---

[2] Petitioners assert (Pet. 17 & n.10) that they raised the question in the court of appeals. But the passage cited by petitioners appears in a footnote in which they simply noted that some courts had held that Section 1997e(a) does not apply to excessive force claims. Appellants' Br. 20 n.9. Petitioners never urged the court of appeals to reverse the district court's judgment on that ground.

from a constitutional violation absent a showing of physical injury.

Petitioners contend (Pet. 22) that the court's interpretation of the physical injury provision conflicts with the Ninth Circuit's decision in *Canell* v. *Lightner*, 143 F.3d 1210 (9th Cir. 1998). There is, however, no conflict. In *Canell*, the Ninth Circuit interpreted the complaint in that case as seeking relief for a violation of First Amendment rights, independent of any mental or emotional injury. In those circumstances, the physical injury provision did not operate as a barrier to suit. *Id.* at 1213. In this case, by contrast, petitioners have expressly sought relief "for their pain, suffering, and other hardships" arising from respondents' alleged acts. Complaint at 17. Since petitioners failed to allege that they have suffered any physical injury, petitioners' claims are barred by the physical injury provision.

The Seventh Circuit decisions relied on by petitioners (Pet. 22) also do not conflict with the decision below. In *Robinson* v. *Page*, 170 F.3d 747, 748-749 (1999), the Seventh Circuit noted that the physical injury provision does not apply to damage claims for injuries that cannot be classified as mental, emotional, or physical. For example, a prisoner who claims damages for a taking of his property could recover for the economic harm of the taking without showing that he suffered a physical injury. *Ibid.* Similarly, in *Rowe* v. *Shake*, 196 F.3d 778, 781 (7th Cir. 1999), as in *Canell*, the court held that an action brought by a prisoner alleging that prison authorities had violated his First Amendment right to receive his mail was not barred by the physical injury provision. The court explained that the prisoner had not sought damages for emotional or mental injury arising from his failure to receive his mail. *Ibid.* Since petitioners have sought damages for

mental or emotional injury, the decisions in *Robinson* and *Rowe* are inapposite here.

There is also no conflict between the decision below and the Second Circuit's decision in *Liner* v. *Goord*, 196 F.3d 132, 135-136 (1999). In *Liner*, the Second Circuit held that the inmate in that case had adequately alleged physical injury and that the physical injury provision therefore did not operate as a barrier to his suit. *Id.* at 135. The court's additional ambiguous statement that the district court had failed to consider whether the inmate's allegations "might state a claim under the Eighth Amendment in addition to stating a claim for emotional distress" was unnecessary to the decision in that case. *Id.* at 135-136.[3]

b. Petitioners also err in contending (Pet. 24-25) that the physical injury provision is unconstitutional insofar as it applies to constitutional claims. This Court's decisions establish that the Constitution does not require an effective damage remedy for every constitutional violation. For example, in *Bush* v. *Lucas*, 462 U.S. 367, 372 nn.7, 8 (1983), the Court upheld a scheme that provides compensation to government employees

---

[3] To the extent that *Canell*, *Rowe*, and *Liner* suggest that a plaintiff can recover compensatory damages under 42 U.S.C. 1983 (Supp. IV 1998) for a constitutional violation without some further showing of actual injury, that suggestion is incorrect. Compensatory damages under Section 1983 lie only for actual injury, not for "the abstract value of a constitutional right." *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 308 (1986). See *Allah* v. *Al-Hafeez*, 226 F.3d 247, 250-251 (3d Cir. 2000) (applying the holding in *Stachura* to a claim brought by an inmate). In any event, since petitioners have sought damages for emotional and mental injury and not for the abstract value of their constitutional rights, the question whether prisoners can recover compensatory damages for the abstract value of their constitutional rights is not presented here.

for unconstitutional employment actions, even though the scheme does not provide for punitive damages, a jury trial, attorneys' fees, or damages for emotional and dignitary harms. Similarly, in *Schweiker* v. *Chilicky*, 487 U.S. 412, 425 (1988), the Court upheld a remedial scheme for violations of the constitutional rights of social security recipients, even though that scheme does not provide a damage remedy for emotional distress or for other hardships suffered because of delay in the receipt of social security benefits. In both cases, the Court held that Congress's chosen remedial scheme provides meaningful safeguards for the protection of constitutional rights, and that Congress had reasonably determined that the additional remedies desired by the plaintiff would impose undesirable costs. *Schweiker*, 487 U.S. at 425; *Bush*, 462 U.S. at 386, 388-389.

In addition, in *Chappell* v. *Wallace*, 462 U.S. 296, 304-305 (1983), the Court held that there is no implied damages remedy for a member of the military who alleges that a military officer has engaged in unconstitutional racial discrimination. And the doctrines of qualified and absolute immunity similarly demonstrate that the Constitution does not require an effective damages remedy for every constitutional violation.

The physical injury provision is constitutional under those precedents. While the physical injury provision bars an award of damages for mental or emotional injury absent a showing of physical injury, it leaves intact meaningful safeguards for the protection of inmates' constitutional rights. Most important, as all the circuits that have addressed the question have concluded, inmates who are subjected to violations of their constitutional rights may still obtain declaratory or injunctive relief. *Harper* v. *Showers*, 174 F.3d 716, 719 (5th Cir. 1999); *Perkins* v. *Kansas Dep't of Corr.*,

165 F.3d 803, 808 (10th Cir. 1999); *Davis* v. *District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998); *Zehner* v. *Trigg*, 133 F.3d 459, 461-463 (7th Cir. 1997). In addition, inmates subjected to constitutional violations may obtain (1) damages for physical injury; (2) damages for emotional and mental injury when they have also suffered a physical injury; and (3) damages for other injuries, such as economic injuries, that cannot be classified as emotional, mental, or physical.[4] As in *Bush* and *Schweiker*, there will be individual cases in which a particular plaintiff will not have an effective damages remedy. But as those cases and others establish, the Constitution does not require that there must be an effective damages remedy for every individual constitutional violation.

Moreover, Congress reasonably determined that permitting an award of damages for mental or emotional

---

[4] When proof of a constitutional violation does not depend on proof of a mental or emotional injury, an inmate may also recover nominal damages and, in certain circumstances, punitive damages, absent a showing of physical injury. *Allah*, 226 F.3d at 251-252. Such an award of damages would be for the "constitutional violation," and not "for mental or emotional injury." *Ibid.* See also *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978) (nominal damages may be awarded under Section 1983 without proof of actual compensable injury); *Smith* v. *Wade*, 461 U.S. 30, 56 (1983) (punitive damages may be awarded under Section 1983 when defendant's conduct "is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others"). In this case, however, petitioners' Eighth Amendment claims depend on proof that they have suffered a mental or emotional injury. Any award of nominal or punitive damages would therefore be "for mental or emotional injury" within the meaning of Section 1997e(e). Accordingly, the physical injury provision bars an award of nominal or punitive damages in this case.

injuries without a showing of physical injury would impose substantial costs. In particular, Congress determined that inmates frequently file frivolous complaints and that many of those complaints are for alleged mental or emotional injuries. In response to that concern, Congress reasonably decided that inmates should not be permitted to file claims for mental or emotional injury absent a showing of physical injury. See *Metro-North Commuter R.R.* v. *Buckley*, 521 U.S. 424, 429-430, 433 (1997) (noting common law tradition of restricting recovery for emotional harm to certain narrowly defined categories, including when it is accompanied by physical harm, and explaining that permitting claims for emotional harm outside those limited categories creates the potential for a flood of comparatively unimportant, or trivial claims).

The court of appeals in this case therefore correctly held that the physical injury provision is constitutional. The courts of appeals that have addressed the question have reached the same conclusion. *Davis* v. *District of Columbia*, 158 F.3d 1342, 1345-1348 (D.C. Cir. 1998); *Zehner* v. *Trigg*, 133 F.3d 459, 461-464 (7th Cir. 1997). Review of that question by this Court is not warranted.

CONCLUSION

With respect to the first question, the petition for a writ of certiorari should be held pending the decision in *Booth* v. *Churner* (No. 99-1964), and then disposed of as appropriate in light of that decision. With respect to the other three questions, the petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Assistant Attorney General

BARBARA L. HERWIG
PETER R. MAIER
Attorneys

DECEMBER 2000

Supreme Court, U.S.
FILED
JAN 17 2001
CLERK

No. 00-484

In The

Supreme Court of the United States

FREDERICK HARRIS, et al.,

Petitioners,

v.

WAYNE GARNER, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONERS

STEPHEN B. BRIGHT
Counsel of Record
TAMARA H. SERWER
83 Poplar Street, N.W.
Atlanta, GA 30303
(404) 688-1202

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. CONTRARY TO THE CONTENTION OF THE UNITED STATES, PETITIONERS ARGUED IN THE COURT OF APPEALS THAT GEORGIA'S INMATE GRIEVANCE PROCEDURE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND PETITIONERS' CASE PRESENTS THE DUE PROCESS ISSUE FOR REVIEW 1

II. THERE IS A CLEAR CONFLICT AMONG THE OPINIONS OF THE COURTS OF APPEALS CONCERNING THE PROPER SCOPE AND APPLICATION OF 42 U.S.C. § 1997e(e) 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bounds v. Smith, 430 U.S. 817 (1977) 2

Canell v. Lightner, 143 F.3d 1210 (9th Cir. 1998) 6, 7

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 2

Fortner v. Thomas, 983 F.2d 1024 (11th Cir. 1993)..... 7

Lewis v. Casey, 518 U.S. 343 (1996) 2

Liner v. Goord, 196 F.3d 132 (2d Cir. 1999)..... 6

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 2

McCarthy v. Madigan, 503 U.S. 140 (1992).....2, 4

Robinson v. Page, 170 F.3d 747 (7th Cir. 1999).....6, 7

Rowe v. Shake, 196 F.3d 778 (7th Cir. 1999) 6, 7

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992)..... 3

Youakim v. Miller, 425 U.S. 231 (1976) 3

DOCKETED CASES

Booth v. Churner, No. 99-1964 .....5, 6

FEDERAL STATUTES

Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) 1

Prison Litigation Reform Act, 42 U.S.C. § 1997e(e) 6, 7, 8

INTRODUCTION

Petitioners submit this reply brief to address misstatements of the record and the law in the State's *Brief in Opposition on Behalf of Respondents* (hereafter *"St. Br."*), and the *Brief for the United States* (hereafter *"U.S. Br."*).

I. CONTRARY TO THE CONTENTION OF THE UNITED STATES, PETITIONERS ARGUED IN THE COURT OF APPEALS THAT GEORGIA'S INMATE GRIEVANCE PROCEDURE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND PETITIONERS' CASE PRESENTS THE DUE PROCESS ISSUE FOR REVIEW.

The United States contends that petitioners did not raise on appeal the question of whether the exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), violates the Due Process Clause of the Fourteenth Amendment where the prison grievance system imposes unreasonably short filing deadlines. *U.S. Br.* at 6. This is incorrect – petitioners clearly raised this due process argument on appeal. Specifically, in their opening Eleventh Circuit brief, petitioners argued:

> Brinkley's, Kilgore's, and Locklear's grievances were denied because they had not been filed within five days of the abuse they received on October 23, 1996.
>
> This harsh and impractical institutional rule should not be extended under § 1997e(a) to prohibit the filing of a civil rights lawsuit. In *McCarthy v. Madigan*, the Supreme Court rejected the federal prison system's attempt to

prohibit lawsuits by inmates who did not manage to comply with the 15-day, 20-day, and 30-day filing deadlines in its administrative remedy process. Such "short, successive filing deadlines," the Court stated, "counsel strongly against exhaustion as a prerequisite to the filing of a federal-court action." 503 U.S. at 152-53. Because the GDC's deadlines are even shorter, it is inconsistent with *McCarthy* to divest inmates who did not manage to grieve in time of their "most fundamental" right to file a court action. *Id.* at 153 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). The victims of officially sanctioned institutional abuse, such as the plaintiffs in this case, cannot constitutionally be denied their fundamental right to file a court action because of their failure to meet extremely short, successive deadlines – especially when all the evidence shows that no remedy is provided to even those inmates who manage to navigate the deadlines successfully. Permanent preclusion of plaintiffs' claims would amount to a violation of their constitutional right to "adequate, effective, and meaningful" access to the courts. *Bounds v. Smith*, 430 U.S. 817, 821-22 (1977); *see also Lewis v. Casey*, 518 U.S. 343, 351 (1996) (reaffirming that prisoners must be provided opportunity "to present claimed violations of fundamental constitutional rights to the courts").

Plaintiffs also have a protected property interest in their federal cause of action. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). Elimination of their interest on this basis would violate the Due Process Clause, as the GDC has not provided "constitutionally adequate procedures" in its system of administrative remedies. *See Cleveland Bd. of Educ. v. Loudermill*,

> 470 U.S. 532, 541 (1985). Five days is simply not enough time for a typical state prisoner to research his rights, obtain the proper forms, and then challenge in writing violent and systematic abuse administered against him by the prison agency's top officials. It is an insufficient "opportunity to present reasons." *Id.* at 546. Plaintiffs' interests in retaining their right to file court actions and the great risk of erroneous and arbitrary deprivation of those interests far outweigh the GDC's interest in maintaining its five- and four-day deadlines.

(*Brief of Appellants* at 24-26). Petitioners raised the due process problem again during oral argument.[1] The United States also argues that even if the due process had been raised on appeal, the issue is not presented under the facts of this case because the grievance procedure used by the Georgia Department of Corrections ("GDC") allows the Grievance Coordinator to "waive [the filing deadline] in appropriate cases for good cause shown." *U.S. Br.* at 6-7 (citing Georgia Dep't of Corr., Standard Operating Procedures, Reference No. IIB05-0001, para V.D.6 (Jan. 1, 1996)). The United States does not explain how this discretionary waiver provision disposes of petitioners' due

---

[1] The State respondents contend that the Court should not review whether the PLRA's exhaustion requirement violates due process because "the issue was not decided by the courts below." *St. Br.* at 6. This argument finds no support in the law of this Court. Rather, the Court has stated repeatedly that it will decide questions that are raised *or* resolved in the lower courts. *See, e.g., Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (same).

process argument. Furthermore, the Court has already rejected the substance of the government's contention.

In *McCarthy v. Madigan*, 503 U.S. 140, 152 (1992), the Court held that a prisoner bringing a Bivens action seeking money damages need not first exhaust the grievance procedure of the Federal Bureau of Prisons ("BOP"). The Court noted that the BOP's grievance procedure "imposes short, successive deadlines that create a high risk of forfeiture of a claim for failure to comply," and observed that these deadlines "are a likely trap for the inexperienced and unwary inmate, ordinarily indigent and unrepresented by counsel, with a substantial claim." *Id.* The Court's analysis was not altered by the fact that these deadlines could be extended for "valid" reasons: "[T]he regulations do not elaborate upon what a 'valid' reason is. Moreover, it appears that prison officials – perhaps the very officials subject to suit – are charged with determining what is a 'valid' reason." *Id.* at 153.

The dismissal of petitioners' case clearly presents due process problems. The GDC requires prisoners to file grievances within five days of the incident giving rise to the complaint. This five-day deadline is followed by a four-day deadline for appealing the decision of the Grievance Coordinator. As was the case in *McCarthy v. Madigan*, the GDC's Standard Operating Procedures do not explain what would constitute "good cause" for waiving the five-day deadline. Thus, Georgia's discretionary waiver provision does not make its otherwise procedurally inadequate grievance system fair and reasonable in accordance with the requirements of due process.

Moreover, three of the petitioners – Brinkley, Kilgore, and Locklear – filed grievances after the magistrate judge (and the district judge thereafter) dismissed their complaints without prejudice for failure to exhaust administrative remedies. In dismissing the complaint without prejudice, the magistrate and district court clearly presumed that, after their ruling, these plaintiffs would be able to seek administrative remedies regarding from the GDC, and the GDC would have an opportunity to review and resolve their complaints. Rather than address the complaints of these prisoners, however, the GDC denied all of them summarily for failure to comply with the GDC's unreasonable five-day filing deadline. *See Pet. Br.* at 11-13.

Because they could not surmount the nearly impossible five- and four-day successive filing deadlines required by the prison's grievance system, these petitioners are now permanently barred from pursuing relief in federal court for the systematic abuse they suffered at the hands of high-ranking prison officials. The Court should grant certiorari to determine whether the PLRA's exhaustion requirement violates the due process clause where the prison's administrative grievance procedure imposes such unreasonable and unnecessary burdens on prisoners.[2]

---

[2] As the United States indicated in its brief, *U.S. Br.* at 6, the Court granted certiorari in *Booth v. Churner*, No. 99-1964, on October 30, to determine the scope of the PLRA's exhaustion provision when the remedy sought by the plaintiff is not available through the grievance system. Petitioners' case raises many of the same issues that the Court will likely address in deciding *Booth v. Churner*. One such issue is the heavy burdens

II. THERE IS A CLEAR CONFLICT AMONG THE OPINIONS OF THE COURTS OF APPEALS CONCERNING THE PROPER SCOPE AND APPLICATION OF 42 U.S.C. § 1997e(e).

The United States contends that there is no conflict between the decision of the court of appeals below and the courts' decisions in *Canell v. Lightner*, 143 F.3d 1210 (9th Cir. 1998), *Robinson v. Page*, 170 F.3d 747 (7th Cir. 1999), *Rowe v. Shake*, 196 F.3d 778 (7th Cir. 1999), and *Liner v. Goord*, 196 F.3d 132 (2d Cir. 1999). This is incorrect.

---

placed on the individual interests of inmates seeking redress for constitutional violations, with very little corresponding benefit to the state or the courts.

In *Booth*, the prisoner was found not to have exhausted his administrative remedies because he failed to appeal the initial resolution of his grievance within the five days required by the state's administrative grievance procedure. In his brief to this Court, the *Booth* petitioner argues, as petitioners here argue, that § 1997e(a) presents a grave risk that prisoners will be permanently barred from seeking redress for violations of their federal constitutional rights because they miss one of a series of very short filing deadlines imposed on them by the prison grievance system. *See Booth v. Churner, Brief of Petitioner*, 2000 WL 1868095 at *33.

The amicus brief filed by the Legal Aid Society of New York, the American Civil Liberties Union, and the Prison Reform Advocacy Center on behalf of Booth, discusses at length the problem of short deadlines and "arcane" and "incomprehensible" grievance procedures. *See Booth v. Churner, Brief of Amici Curiae*, 2000 WL 1868111 at *12-30. These amici note correctly that procedural barriers "are especially problematic in connection with the prison population which is generally legally unsophisticated, poorly educated, and functionally illiterate." *Id.* at *13 & n.14.

The United States attempts to distinguish *Canell*, *Robinson*, and *Rowe* from petitioners' case by arguing that the plaintiffs in those cases "sought relief for violation of rights independent of any mental or emotional injury," and here petitioners are seeking relief for mental or emotional injury. *U.S. Br.* at 9-10. This distinction has no basis, as the court's reasoning in *Canell* demonstrates:

> [Plaintiff] is not asserting a claim for "mental or emotional injury." He is asserting a claim for a violation of his First Amendment rights. The deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred. Therefore, § 1997e(e) does not apply to First Amendment Claims *regardless of the form of relief sought*. (Emphasis added).

Canell, 143 F.3d at 1213. Petitioners' claims are no different from those asserted in *Canell* for purposes of applying § 1997e(e). Petitioners, like the plaintiff in *Canell*, are entitled to judicial relief for violations of their right to bodily privacy wholly aside from any physical, mental, or emotional injury they can show. *See Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (recognizing that prisoners retain fundamental right to bodily privacy which is violated by involuntary exposure of their genitals in the presence of people of the opposite sex). Thus, under the reasoning of *Canell*, § 1997e(e) should not bar petitioners' bodily privacy claims, regardless of the form of relief petitioners sought.[3]

---

[3] Similarly, the United States contends that civil rights plaintiffs may obtain nominal and punitive damages when

The Court should grant certiorari to resolve this conflict in the decisions of the courts of appeals and settle an important federal question concerning the scope of 42 U.S.C. § 1997e(e).

CONCLUSION

For the foregoing reasons and for the reasons set forth in the *Petition for Writ of Certiorari*, the Court should grant review of the important issues presented by this case.

Respectfully submitted, this 17th day of January, 2001,

STEPHEN B. BRIGHT
Georgia Bar No. 082075
TAMARA H. SERWER
Georgia Bar No. 617053
83 Poplar Street, N.W.
Atlanta, Georgia 30303-2122
(404) 688-1202

Counsel for Petitioners

"proof of a constitutional violation does not depend on proof of a mental or emotional injury." *U.S. Br.* at 12 n.4. Proof of a violation of bodily privacy does not depend on proof of mental or emotional injury any more than a violation of the First Amendment does. According to the reasoning of the United States, nominal and punitive damages should be available to petitioners.